

**From:** [Fugh, Justina](#)  
**To:** [Adhar, Radha](#); [Enobakhare, Rosemary](#); [Fox, Radhika](#); [Hamilton, Lindsay](#); [Harris, Sincere](#); [Hoffer, Melissa](#); [Katims, Casey](#); [Utech, Dan](#)  
**Subject:** Friendly reminder to please sign the attached Biden Ethics pledge  
**Date:** Tuesday, January 26, 2021 12:22:00 AM  
**Attachments:** [Biden Ethics Pledge for digital signature.pdf](#)

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Thanks in advance! You can send it back to me or to [ethics@epa.gov](mailto:ethics@epa.gov).

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

## ETHICS PLEDGE

I recognize that this pledge is part of a broader ethics in government plan designed to restore and maintain public trust in government, and I commit myself to conduct consistent with that plan. I commit to decision-making on the merits and exclusively in the public interest, without regard to private gain or personal benefit. I commit to conduct that upholds the independence of law enforcement and precludes improper interference with investigative or prosecutorial decisions of the Department of Justice. I commit to ethical choices of post-Government employment that do not raise the appearance that I have used my Government service for private gain, including by using confidential information acquired and relationships established for the benefit of future clients.

Accordingly, as a condition, and in consideration, of my employment in the United States Government in a position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:

1. *Lobbyist Gift Ban.* I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.
2. *Revolving Door Ban — All Appointees Entering Government.* I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
3. *Revolving Door Ban — Lobbyists and Registered Agents Entering Government.* If I was registered under the Lobbying Disclosure Act, 2 U.S.C. 1601 *et seq.*, or the Foreign Agents Registration Act (FARA), 22 U.S.C. 611 *et seq.*, within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:
  - (a) participate in any particular matter on which I lobbied, or engaged in registrable activity under FARA, within the 2 years before the date of my appointment;
  - (b) participate in the specific issue area in which that particular matter falls; or
  - (c) seek or accept employment with any executive agency with respect to which I lobbied, or engaged in registrable activity under FARA, within the 2 years before the date of my appointment.
4. *Revolving Door Ban — Appointees Leaving Government.* If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, and its implementing regulations, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment. I will abide by these same restrictions with respect to communicating with the senior White House staff.
5. *Revolving Door Ban — Senior and Very Senior Appointees Leaving Government.* If, upon my departure from the Government, I am covered by the post-employment restrictions set forth in sections 207(c) or 207(d) of title 18, United States Code, and those sections' implementing regulations, I agree that, in addition, for a period of 1 year following the end of my appointment, I will not materially assist others in making communications or appearances that I am prohibited from undertaking myself by (a) holding myself out as being available to engage in lobbying activities in support of any such communications or appearances; or (b) engaging in any such lobbying activities.
6. *Revolving Door Ban — Appointees Leaving Government to Lobby.* In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee, or engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2021, would require that I register under FARA, for the remainder of the Administration or 2 years following the end of my appointment, whichever is later.
7. *Golden Parachute Ban.* I have not accepted and will not accept, including after entering Government, any salary or other cash payment from my former employer the eligibility for and payment of which is limited to individuals accepting a position in the United States Government. I also have not accepted and will not accept any non-cash benefit from my former employer that is provided in lieu of such a prohibited cash payment.
8. *Employment Qualification Commitment.* I agree that any hiring or other employment decisions I make will be based on the candidate's qualifications, competence, and experience.
9. *Assent to Enforcement.* I acknowledge that the Executive Order entitled "Ethics Commitments by Executive Branch Personnel," issued by the President on January 20, 2021, which I have read before signing this document, defines certain of the terms applicable to the foregoing obligations and sets forth the methods for enforcing them. I expressly accept the provisions of that Executive Order as a part of this agreement and as binding on me. I understand that the terms of this pledge are in addition to any statutory or other legal restrictions applicable to me by virtue of Federal Government service.

Signature \_\_\_\_\_

\_\_\_\_\_, 20\_\_\_\_  
Date

Name (Type or Print): \_\_\_\_\_

**From:** [Fugh, Justina](#)  
**To:** [Adhar, Radha](#); [Blythers, Dorien](#); [Hoffer, Melissa](#); [Lance, Kathleen](#); [Mayock, Andrew](#); [Mercado Violand, Fernando](#)  
**Subject:** REMINDER to sign the Biden Ethics Pledge  
**Date:** Monday, February 01, 2021 1:53:00 PM  
**Attachments:** [Biden Ethics Pledge for digital signature.pdf](#)

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Please remember to sign the attached Biden ethics pledge and return to me or to [ethics@epa.gov](mailto:ethics@epa.gov) . This document is set up for your digital signature.

Thanks,

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

**From:** [Fugh, Justina](#)  
**To:** [Adhar, Radha](#); [Blythers, Dorien](#); [Hoffer, Melissa](#); [Mayock, Andrew](#); [Mercado Violand, Fernando](#)  
**Subject:** REVISED: REMINDER to sign the Biden Ethics Pledge  
**Date:** Monday, February 01, 2021 2:25:00 PM  
**Attachments:** [Biden Ethics Pledge for digital signature.pdf](#)

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Here's a blank pledge form for you to sign.

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**From:** Fugh, Justina

**Sent:** Monday, February 01, 2021 1:53 PM

**To:** Adhar, Radha <Adhar.Radha@epa.gov>; Blythers, Dorien <Blythers.Dorien@epa.gov>; Hoffer, Melissa <Hoffer.Melissa@epa.gov>; Lance, Kathleen <Lance.Kathleen@epa.gov>; Mayock, Andrew <Mayock.Andrew@epa.gov>; Mercado Violand, Fernando <MercadoVioland.Fernando@epa.gov>

**Subject:** REMINDER to sign the Biden Ethics Pledge

Please remember to sign the attached Biden ethics pledge and return to me or to [ethics@epa.gov](mailto:ethics@epa.gov) . This document is set up for your digital signature.

Thanks,

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772



**From:** [Hoffer, Melissa](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Payne, James \(Jim\)](#)  
**Subject:** Hoffer Executed Biden Ethics Pledge  
**Date:** Friday, February 05, 2021 5:21:56 PM  
**Attachments:** [Hoffer Biden Ethics Pledge for digital signature.pdf](#)

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Hi Justina,

My executed Ethics Pledge is attached. Thank you and have a good weekend.

Melissa

## ETHICS PLEDGE

I recognize that this pledge is part of a broader ethics in government plan designed to restore and maintain public trust in government, and I commit myself to conduct consistent with that plan. I commit to decision-making on the merits and exclusively in the public interest, without regard to private gain or personal benefit. I commit to conduct that upholds the independence of law enforcement and precludes improper interference with investigative or prosecutorial decisions of the Department of Justice. I commit to ethical choices of post-Government employment that do not raise the appearance that I have used my Government service for private gain, including by using confidential information acquired and relationships established for the benefit of future clients.

Accordingly, as a condition, and in consideration, of my employment in the United States Government in a position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:

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2. *Revolving Door Ban — All Appointees Entering Government.* I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
3. *Revolving Door Ban — Lobbyists and Registered Agents Entering Government.* If I was registered under the Lobbying Disclosure Act, 2 U.S.C. 1601 *et seq.*, or the Foreign Agents Registration Act (FARA), 22 U.S.C. 611 *et seq.*, within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:
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  - (b) participate in the specific issue area in which that particular matter falls; or
  - (c) seek or accept employment with any executive agency with respect to which I lobbied, or engaged in registrable activity under FARA, within the 2 years before the date of my appointment.
4. *Revolving Door Ban — Appointees Leaving Government.* If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, and its implementing regulations, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment. I will abide by these same restrictions with respect to communicating with the senior White House staff.
5. *Revolving Door Ban — Senior and Very Senior Appointees Leaving Government.* If, upon my departure from the Government, I am covered by the post-employment restrictions set forth in sections 207(c) or 207(d) of title 18, United States Code, and those sections' implementing regulations, I agree that, in addition, for a period of 1 year following the end of my appointment, I will not materially assist others in making communications or appearances that I am prohibited from undertaking myself by (a) holding myself out as being available to engage in lobbying activities in support of any such communications or appearances; or (b) engaging in any such lobbying activities.
6. *Revolving Door Ban — Appointees Leaving Government to Lobby.* In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee, or engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2021, would require that I register under FARA, for the remainder of the Administration or 2 years following the end of my appointment, whichever is later.
7. *Golden Parachute Ban.* I have not accepted and will not accept, including after entering Government, any salary or other cash payment from my former employer the eligibility for and payment of which is limited to individuals accepting a position in the United States Government. I also have not accepted and will not accept any non-cash benefit from my former employer that is provided in lieu of such a prohibited cash payment.
8. *Employment Qualification Commitment.* I agree that any hiring or other employment decisions I make will be based on the candidate's qualifications, competence, and experience.
9. *Assent to Enforcement.* I acknowledge that the Executive Order entitled "Ethics Commitments by Executive Branch Personnel," issued by the President on January 20, 2021, which I have read before signing this document, defines certain of the terms applicable to the foregoing obligations and sets forth the methods for enforcing them. I expressly accept the provisions of that Executive Order as a part of this agreement and as binding on me. I understand that the terms of this pledge are in addition to any statutory or other legal restrictions applicable to me by virtue of Federal Government service.

**Melissa A. Hoffer** Digitally signed by Melissa A. Hoffer  
Date: 2021.02.05 17:19:39 -05'00'

Signature

Name (Type or Print):

**Melissa A. Hoffer**

**2/5**

Date

**21**

, 20

**From:** [Fugh, Justina](#)  
**To:** [Payne, James \(Jim\)](#); [Packard, Elise](#); [Hoffer, Melissa](#)  
**Cc:** [OGC Ethics](#)  
**Subject:** Impartiality determination (and case list) for Melissa Hoffer  
**Date:** Thursday, January 21, 2021 9:52:00 AM  
**Attachments:** [Melissa Hoffer impartiality determination 1-19-21 Redacted.pdf](#)  
[enclosure to impartiality determination 1-19-21.docx](#)  
[enclosure to impartiality determination 1-19-21.docx](#)

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Hi there,

Attached is the limited impartiality determination that permits Melissa Hoffer to participate in making policy decisions only related to cases in which her former employer/client, the Commonwealth of Massachusetts, is a party or intervenor. Irrespective of whether she participated herself personally and substantially in those cases, I have determined that she may participate in making “policy decisions as to whether or not to pursue current litigation.” Because this letter was issued to her prior to joining federal service, it contained personal privacy information that has been redacted. Please note that this determination is limited and does not allow her to participate generally with the Commonwealth of Massachusetts on other specific party matters. Should that need arise, we will have to consider another impartiality determination.

Attached is the version of the limited impartiality determination that can be distributed broadly (with grateful thanks to Shannon for figuring out how to redact portions of a signed pdf).

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

Ms. Melissa A. Hoffer  
[REDACTED]

By email to: [REDACTED]

Dear Ms. Hoffer:

In anticipation of your joining the United States Environmental Protection Agency (EPA) as the Principal Deputy General Counsel on or about January 20, 2021, you have asked if you would be permitted to participate in making policy decisions regarding specific party matters in which the Commonwealth of Massachusetts is a party or intervenor. Based on your request and the information available to us, the EPA generated the enclosed list of cases.

Within the last year, you have served as the Chief of the Energy and Environment Bureau of the Office of the Massachusetts Attorney General. We understand that you participated personally and substantially in a number of these cases or supervised others who participated personally and substantially in these particular matters that involve Massachusetts as a specific party.

Upon your swearing in as a federal employee, you will have a "covered relationship" with the Commonwealth of Massachusetts pursuant to 5 C.F.R. § 2635.502(b)(iv) and, for one year, must be mindful to avoid an appearance of a loss of impartiality in the performance of your official EPA duties. You do not have any significant financial interest in the Commonwealth of Massachusetts, so the Office of General Counsel does not determine that you had any conflicting financial interest. What remains is an impartiality concern.

Federal ethics regulations permit federal officials to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). These factors are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and

(6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Since we have already determined that you have no substantial conflicting financial interest arising from your employment with Massachusetts, we turned to the six impartiality factors listed in 5 C.F.R. § 2635.502(d), taking each one into careful consideration.

We noted that your prior employment was with a State rather than a private entity. Generally, States share responsibility with EPA in protecting human health and the environment. In fact, with respect to many of our statutes, EPA has directly delegated regulatory and enforcement authority to states. That said, we also appreciate that, in some situations, States are directly regulated by this Agency.

We are mindful of the fact that the position description for the Principal Deputy General Counsel includes "First Assistant" duties for the General Counsel under the Vacancies Reform Act of 1998, 5 U.S.C. § 3345. We therefore considered the interests of the United States Government in a senior political appointee's ability to make policy decisions as to whether or not to continue to pursue current litigation, particularly at the onset of a new administration in the absence of a confirmed General Counsel or Administrator. Although we recognize that you face bar restrictions limiting your ability to participate in these cases substantively, we determined that your participation is not related to the underlying merits of any case but rather you would be making policy decisions only.

After careful consideration of the relevant factors, we conclude that the interest of the federal government outweighs any concerns about a loss of impartiality in your ability to participate in the enclosed list of particular matters that may affect or involve the Commonwealth of Massachusetts as a party and in which you may have participated personally and substantially. After joining the EPA as Principal Deputy General Counsel, you will be permitted to participate in discussions and meetings related to the policy decisions related to these cases. We remind you, however, not to participate in the merits of the cases nor to reveal any client confidences.

Please feel free to contact me or Jim Payne, Designated Agency Ethics Official, if you have any further questions. I can be reached at fugh.justina@epa.gov or (202) 564-1786; Jim can be reached at payne.jim@epa.gov or (202) 564-0212.

Sincerely yours,

Justina Fugh

Digitally signed by Justina  
Fugh  
Date: 2021.01.19  
18:45 38 -05'00'

Justina Fugh

Director, Ethics Office and

Alternate Designated Agency Ethics Official

enclosure

**LIST OF CASES IN WHICH MASSACHUSETTS IS A PARTY OR INTERVENOR**  
**PENDING IN EPA'S OFFICE OF GENERAL COUNSEL**

**Commonwealth of Massachusetts**

Defendant Intervenor:

- *Wisconsin v. EPA*, D.C. Cir. 16-1406 - petition for review of EPA's Final Rule titled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS" 81 Fed. Reg. 74,504 (October 26, 2016)
- *Competitive Enterprise Institute v. EPA*, D.C. Cir. 20-1145 - petition to review "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks" Fed. Reg. 24174-25278 (April 30, 2020)
- *Murray Energy v. EPA*, 16-1127 D.C. Cir. - petition for review of EPA's final action entitled "Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units at 81 Fed. Reg. 24,420 (April 25, 2016)
- D.C. Cir. 16-1430 (defend EPA medium and heavy duty truck GHG standards)

Intervenor:

- *League of United Latin American Citizens (LULAC), et al. v. EPA*, 9<sup>th</sup> Cir. 17-71636 - Challenge to March 29, 2017 order denying PANNA/NRDC FFDCA petition
- *North Dakota v. EPA*, D.C. Cir. No.15-1381 - EGU GHG 111(b)

Petitioner

- D.C. Cir. 19-1230 (SAFE CA waiver )
- *New York et. al. v. Wheeler et. al.*, S.D.N.Y. 19-11673 - Challenge to the rule repealing the 2015 definition of "waters of the United States" under the CWA and reinstating the prior regulatory definition.
- *New York et. al. v. EPA*, D.C. Cir. 17-1273 - petition for review of EPA's final action titled "Response to the December 9, 2013, Clean Air Act Section 176A Petition From Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont," 82 Fed. Reg. 51,238 (November 3, 2017)
- *New York et. al. v. EPA*, D.D.C. 1:18-cv-00773 - for failure to establish guidelines for standards of performance for methane emissions from existing oil and gas operations
- *New York et. al. v. EPA*, D.C. Cir. 18-xxxx - petition for review of EPA's notice entitled "Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program," 83 Fed. Reg. 18,431 (April 27, 2018)
- *New York et. al. v. Wheeler et. al.*, 9<sup>th</sup> Cir. 19-71982 - Petition for review of "Chlorpyrifos; Final Order Denying Objections to March 2017 Petition Denial Order"
- *New York et. al. v. EPA*, D.C. Cir. 19-1165 - petition for review of EPA's final agency action entitled "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," published at 84 Fed. Reg. 32,520 (July 8, 2019)
- *New York et. al. v. EPA*, D.C. Cir 20-1437 - petition for review of EPA's final action titled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Actions on Petitions for Reconsideration" at 85 Fed. Reg. 55,286 (Sept. 4, 2020)
- *New York et. al. v. EPA*, S.D.N.Y. 1:21-cv-00252 - for failure to approve or disapprove Good Neighbor state implementation plans for the 2015 ozone NAAQS for 6 states (IN, KY, MI, OH, TX, WV)



- *New York et. al. v. EPA*, S.D.N.Y. 1:16-cv-07827 - Failure to Act on their Petitions Under Clean Air Act Section 176A
- *California et. al. v. EPA*, D.C. Cir. Case No. 21-XXXX – petition for review of final agency action entitled “Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures,” published at 86 Fed. Reg. 2,136 (Jan. 11, 2021).
- *California et. al. v. Wheeler et. al.*, N.D. Cal. 3:20cv03005 – NWPR
- *California et. al. v. EPA*, N.D. Cal. 3:17-cv-06936; 4:17-cv-06936 - for Failure to Issue Designations for 2015 Ozone National Ambient Air Quality Standards
- *California et. al. v. EPA*, D.C. Cir. 20-1357 - Petition for review challenging the Oil & Gas Policy Rule: “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review” 85 Fed. Reg. 57,018 (Sept. 14, 2020)
- *California et. al. v. EPA*, D.C. Cir. 21-1014 - petition for review of EPA's final action entitled “Review of the National Ambient Air Quality Standards for Particulate Matter,” published at 85 Fed. Reg. 82,684 (Dec. 18, 2020)
- *Commonwealth of Massachusetts et. al v. EPA*, 3:03-CV-984 D. Conn. - Failure to list CO2 as a criteria pollutant
- *Commonwealth of Massachusetts et. al v. EPA*, D.C. Cir. 20-1221 - Petition for Review of EPA’s National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review at 85 Fed. Reg. 31,286 (May 22, 2020) (aka MATS)
- *New Jersey et. al. v. EPA*, S.D.N.Y. 1:20-cv-01425 - for Failure to Perform Nondiscretionary Duty to Promulgate Federal Implementation Plans for the Good Neighbor Provision Requirements for the 2008 Ozone NAAQS
- *American Lung Association v EPA*, D.C. Cir No. 19-1440 – ACE litigation
- D.C. Cir. No. 20-1145
- N.D. Cal. No. 19-cv-03807 (TSCA asbestos reporting)
- Ninth Cir. No. 20-73276 (methylene chloride risk evaluation)
- N.D. Cal. No. 20-cv-04869 (limiting state authority re Section 401 water quality certifications)
- MA-led amicus in support of challenge to WOTUS, D-Mass 12/20 (do not have docket no.)

### **Massachusetts Department of Environmental Protection**

#### **Defendant:**

- *Alderson v. EPA et. al.*, 1:10-cv-10793 (appears dismissed but displayed as active?)
- *PSD Appeal No. 14-02*, E.A.B.- PSD permit issued by Massachusetts DEP
- *Brooks v. EPA et. al.*, 1<sup>st</sup> Cir. 14-2252, petition for review of Notice of Decision To Issue a Clean Air Act PSD Permit for Salem Harbor Redevelopment Project
- *Rauseo v. Army Corps of Engineers et. al.*, D. Mass. 1:17-cv-12026-NMG - Failure to exercise jurisdiction over filled wetlands

#### **ADDITIONAL CASES:**

*Greenroots, Inc. and Conservation Law Foundation v. EPA*, (District of Massachusetts, Case No. 1:21-cv-10065) (Mass is not a party but the case involves some complaints filed with ECRCO against Mass agencies.)

Intervenor, Newmont USA Limited v. EPA, No. 04-1069 (Challenge to 2002 NSR reform rule treatment of fugitive emissions)

Petitioner, State of New York v. EPA, No. 20-1022 (Challenge to 2019 RMP Rule) (consolidated under Air Alliance Houston v. EPA, No. 19-1260)

**From:** [Hoffer, Melissa](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Payne, James \(Jim\)](#); [Clarke, Victoria](#)  
**Subject:** RE: ACE Rule Ethics Question  
**Date:** Monday, February 08, 2021 1:50:28 PM

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Thanks, Justina. Confirmed and I will remove it from my calendar. Thank you.

-----Original Message-----

From: Fugh, Justina <Fugh.Justina@epa.gov>  
Sent: Monday, February 8, 2021 12:09 PM  
To: Hoffer, Melissa <Hoffer.Melissa@epa.gov>  
Cc: Payne, James (Jim) <payne.james@epa.gov>; Clarke, Victoria <clarke.victoria@epa.gov>  
Subject: Re: ACE Rule Ethics Question

Hi -

I (b) (6) but Victoria Clarke of Team Ethics answered ARLO and Jim, advising that you do not participate in this. I support that recommendation. Last I heard, ARLO is not going to raise that with you.

Justina

Sent from my iPhone

> On Feb 8, 2021, at 11:20 AM, Hoffer, Melissa <Hoffer.Melissa@epa.gov> wrote:

>

> Hi Justina,

>

> Tomorrow I am scheduled to join an ARLO meeting to discuss next steps now that the CADC has vacated the ACE Rule (successor to Clean Power Plan). MA AGO supported Clean Power Plan and opposed ACE and I was very involved in those litigations. ACE is therefore one the cases from which I am recused.

>

> Jim mentioned (b) (5)

(b) (5)

>

> I think (b) (5)

(b) (5)

>

> Do you have a recommendation on how I should approach?

>

> Thanks,

> Melissa

>

>

>

> Sent from my iPhone



**From:** [Fugh, Justina](#)  
**To:** [OGC HQ ADDs](#); [OGC RCs and DRCs](#)  
**Cc:** [Hoffer, Melissa](#); [Chaudhary, Dimple](#); [Clarke, Victoria](#); [Griffo, Shannon](#)  
**Subject:** an ethics welcome to Melissa Hoffer and Dimple Chaudhary  
**Date:** Thursday, January 21, 2021 9:12:31 PM  
**Attachments:** [impartiality determination 1-19-21 redacted.pdf](#)  
[enclosure to impartiality determination 1-19-21 updated 1-21-21.docx](#)

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Hi there,

As you might expect, the OGC/Ethics Office is cheerfully up to our eyeballs in ethics issues for our incoming appointees. Not only are we thinking, as we always do, about financial conflicts of interest, but we are also weighing impartiality concerns with former employers and former clients, bar obligations and now an executive order on ethics commitments. We will be drafting recusal statements, but we typically wait until after we have a chance to review the financial disclosure reports. As many of you also file that wretched report, you know how much work that entails. So, before we can distribute signed recusal statements, here's how to navigate the likely recusal issues for Melissa Hoffer and Dimple Chaudhary.

MELISSA HOFFER

- Melissa is bound by her bar restrictions from sharing the confidences of her former client, the Commonwealth of Massachusetts, and from switching sides in litigation in which she previously participated or for which she provided supervision. With the attached impartiality determination, however, I authorized her to participate in making policy decisions about that litigation, such as whether or not to stay the proceedings. That impartiality determination included the list of cases from which she is recused because of her bar obligations. For her tenure at EPA, she will be recused from participation in these cases.
- For now and continuing for one year, she is recused from participation in any new specific party matter in which Massachusetts is a party or represents a party. Should we issue another impartiality determination, I will share that with you.

DIMPLE CHAUDHARY

- Dimple is bound by her bar restrictions from sharing the confidences of her former client, the Natural Resources Defense Council, and from switching sides in litigation in which she previously participated or for which she provided supervision or counsel. The cases from which she is recused are:

CASE NAME and/or SUBJECT MATTER	CITATION and/or DESCRIPTION:
Consent Decree Implementation of Agency's failure to issue a worst-case spill regulation for non-transportation-related-substantial-harm facilities	<i>Environmental Justice Health Alliance for Chemical Policy Reform, NRDC, et al. v. EPA</i> , Case No. 19-cv-2516, SDNY
Challenge to Methylene chloride rule	<i>Labor Council for Latin America, NRDC, et al. v. EPA</i> , Case No. 19-1042, 2d Cir.
Challenge to use of tetrachlorvinphos on pets	<i>NRDC v. Wheeler</i> , Case No. 20-72794, 9th Cir.
Provided individual counseling to plaintiffs in Flint water crisis	<i>Walters v. Flint, EPA, et al.</i> , Case No. 17-10164, E.D. Mich.

- Because Dimple's former employer is not a state or local government, she is further bound by Section 2 of the Biden Ethics Pledge. We cannot grant impartiality determinations for her. Instead, for two years, she cannot participate in any specific party matter in which NRDC is a party or represents a party. She may not attend any meeting nor have any communication with NRDC unless the communication relates to a particular matter of general applicability and participation in the event is open to all interested parties. Dimple's recusal period with NRDC on any specific party matter (e.g., litigation, contracts, grants, speaking engagement) will last until after January 20, 2023.

If you have any questions about these general recusal areas, then please let me know.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

Ms. Melissa A. Hoffer  
[REDACTED]

By email to: [REDACTED]

Dear Ms. Hoffer:

In anticipation of your joining the United States Environmental Protection Agency (EPA) as the Principal Deputy General Counsel on or about January 20, 2021, you have asked if you would be permitted to participate in making policy decisions regarding specific party matters in which the Commonwealth of Massachusetts is a party or intervenor. Based on your request and the information available to us, the EPA generated the enclosed list of cases.

Within the last year, you have served as the Chief of the Energy and Environment Bureau of the Office of the Massachusetts Attorney General. We understand that you participated personally and substantially in a number of these cases or supervised others who participated personally and substantially in these particular matters that involve Massachusetts as a specific party.

Upon your swearing in as a federal employee, you will have a "covered relationship" with the Commonwealth of Massachusetts pursuant to 5 C.F.R. § 2635.502(b)(iv) and, for one year, must be mindful to avoid an appearance of a loss of impartiality in the performance of your official EPA duties. You do not have any significant financial interest in the Commonwealth of Massachusetts, so the Office of General Counsel does not determine that you had any conflicting financial interest. What remains is an impartiality concern.

Federal ethics regulations permit federal officials to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). These factors are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and

(6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Since we have already determined that you have no substantial conflicting financial interest arising from your employment with Massachusetts, we turned to the six impartiality factors listed in 5 C.F.R. § 2635.502(d), taking each one into careful consideration.

We noted that your prior employment was with a State rather than a private entity. Generally, States share responsibility with EPA in protecting human health and the environment. In fact, with respect to many of our statutes, EPA has directly delegated regulatory and enforcement authority to states. That said, we also appreciate that, in some situations, States are directly regulated by this Agency.

We are mindful of the fact that the position description for the Principal Deputy General Counsel includes "First Assistant" duties for the General Counsel under the Vacancies Reform Act of 1998, 5 U.S.C. § 3345. We therefore considered the interests of the United States Government in a senior political appointee's ability to make policy decisions as to whether or not to continue to pursue current litigation, particularly at the onset of a new administration in the absence of a confirmed General Counsel or Administrator. Although we recognize that you face bar restrictions limiting your ability to participate in these cases substantively, we determined that your participation is not related to the underlying merits of any case but rather you would be making policy decisions only.

After careful consideration of the relevant factors, we conclude that the interest of the federal government outweighs any concerns about a loss of impartiality in your ability to participate in the enclosed list of particular matters that may affect or involve the Commonwealth of Massachusetts as a party and in which you may have participated personally and substantially. After joining the EPA as Principal Deputy General Counsel, you will be permitted to participate in discussions and meetings related to the policy decisions related to these cases. We remind you, however, not to participate in the merits of the cases nor to reveal any client confidences.

Please feel free to contact me or Jim Payne, Designated Agency Ethics Official, if you have any further questions. I can be reached at fugh.justina@epa.gov or (202) 564-1786; Jim can be reached at payne.jim@epa.gov or (202) 564-0212.

Sincerely yours,

Justina Fugh

Digitally signed by Justina  
Fugh  
Date: 2021.01.19  
18:45 38 -05'00'

Justina Fugh

Director, Ethics Office and

Alternate Designated Agency Ethics Official

enclosure

**LIST OF CASES IN WHICH MASSACHUSETTS IS A PARTY OR INTERVENOR**  
**PENDING IN EPA'S OFFICE OF GENERAL COUNSEL**

**Commonwealth of Massachusetts**

Defendant Intervenor:

- *Wisconsin v. EPA*, D.C. Cir. 16-1406 - petition for review of EPA's Final Rule titled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS" 81 Fed. Reg. 74,504 (October 26, 2016)
- *Competitive Enterprise Institute v. EPA*, D.C. Cir. 20-1145 - petition to review "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks" Fed. Reg. 24174-25278 (April 30, 2020)
- *Murray Energy v. EPA*, 16-1127 D.C. Cir. - petition for review of EPA's final action entitled "Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units at 81 Fed. Reg. 24,420 (April 25, 2016)
- D.C. Cir. 16-1430 (defend EPA medium and heavy-duty truck GHG standards)

Intervenor:

- *League of United Latin American Citizens (LULAC), et al. v. EPA*, 9<sup>th</sup> Cir. 17-71636 - Challenge to March 29, 2017 order denying PANNA/NRDC FFDCA petition
- *North Dakota v. EPA*, D.C. Cir. No.15-1381 - EGU GHG 111(b)

Petitioner

- D.C. Cir. 19-1230 (SAFE CA waiver )
- *New York et. al. v. Wheeler et. al.*, S.D.N.Y. 19-11673 - Challenge to the rule repealing the 2015 definition of "waters of the United States" under the CWA and reinstating the prior regulatory definition.
- *New York et. al. v. EPA*, D.C. Cir. 17-1273 - petition for review of EPA's final action titled "Response to the December 9, 2013, Clean Air Act Section 176A Petition From Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont," 82 Fed. Reg. 51,238 (November 3, 2017)
- *New York et. al. v. EPA*, D.D.C. 1:18-cv-00773 - for failure to establish guidelines for standards of performance for methane emissions from existing oil and gas operations
- *New York et. al. v. EPA*, D.C. Cir. 18-xxxx - petition for review of EPA's notice entitled "Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program," 83 Fed. Reg. 18,431 (April 27, 2018)
- *New York et. al. v. Wheeler et. al.*, 9<sup>th</sup> Cir. 19-71982 - Petition for review of "Chlorpyrifos; Final Order Denying Objections to March 2017 Petition Denial Order"
- *New York et. al. v. EPA*, D.C. Cir. 19-1165 - petition for review of EPA's final agency action entitled "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," published at 84 Fed. Reg. 32,520 (July 8, 2019)
- *New York et. al. v. EPA*, D.C. Cir 20-1437 - petition for review of EPA's final action titled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Actions on Petitions for Reconsideration" at 85 Fed. Reg. 55,286 (Sept. 4, 2020)
- *New York et. al. v. EPA*, S.D.N.Y. 1:21-cv-00252 - for failure to approve or disapprove Good Neighbor state implementation plans for the 2015 ozone NAAQS for 6 states (IN, KY, MI, OH, TX, WV)

- *New York et. al. v. EPA*, S.D.N.Y. 1:16-cv-07827 - Failure to Act on their Petitions Under Clean Air Act Section 176A
- *California et. al. v. EPA*, D.C. Cir. Case No. 21-XXXX – petition for review of final agency action entitled “Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures,” published at 86 Fed. Reg. 2,136 (Jan. 11, 2021).
- *California et. al. v. Wheeler et. al.*, N.D. Cal. 3:20cv03005 – NWPR
- *California et. al. v. EPA*, N.D. Cal. 3:17-cv-06936; 4:17-cv-06936 - for Failure to Issue Designations for 2015 Ozone National Ambient Air Quality Standards
- *California et. al. v. EPA*, D.C. Cir. 20-1357 - Petition for review challenging the Oil & Gas Policy Rule: “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review” 85 Fed. Reg. 57,018 (Sept. 14, 2020)
- *California et. al. v. EPA*, D.C. Cir. 21-1014 - petition for review of EPA's final action entitled “Review of the National Ambient Air Quality Standards for Particulate Matter,” published at 85 Fed. Reg. 82,684 (Dec. 18, 2020)
- *Commonwealth of Massachusetts et. al v. EPA*, 3:03-CV-984 D. Conn. - Failure to list CO2 as a criteria pollutant
- *Commonwealth of Massachusetts et. al v. EPA*, D.C. Cir. 20-1221 - Petition for Review of EPA’s National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review at 85 Fed. Reg. 31,286 (May 22, 2020) (aka MATS)
- *New Jersey et. al. v. EPA*, S.D.N.Y. 1:20-cv-01425 - for Failure to Perform Nondiscretionary Duty to Promulgate Federal Implementation Plans for the Good Neighbor Provision Requirements for the 2008 Ozone NAAQS
- *American Lung Association v EPA*, D.C. Cir No. 19-1440 – ACE litigation
- D.C. Cir. No. 20-1145
- N.D. Cal. No. 19-cv-03807 (TSCA asbestos reporting)
- Ninth Cir. No. 20-73276 (methylene chloride risk evaluation)
- N.D. Cal. No. 20-cv-04869 (limiting state authority re Section 401 water quality certifications)
- MA-led amicus in support of challenge to WOTUS, D-Mass 12/20 (do not have docket no.)

### **Massachusetts Department of Environmental Protection**

#### **Defendant:**

- *Alderson v. EPA et. al.*, 1:10-cv-10793 (appears dismissed but displayed as active?)
- *PSD Appeal No. 14-02*, E.A.B.- PSD permit issued by Massachusetts DEP
- *Brooks v. EPA et. al.*, 1<sup>st</sup> Cir. 14-2252, petition for review of Notice of Decision To Issue a Clean Air Act PSD Permit for Salem Harbor Redevelopment Project
- *Rauseo v. Army Corps of Engineers et. al.*, D. Mass. 1:17-cv-12026-NMG - Failure to exercise jurisdiction over filled wetlands

#### **ADDITIONAL CASES:**

- *Greenroots, Inc. and Conservation Law Foundation v. EPA*, (District of Massachusetts, Case No. 1:21-cv-10065) (Mass is not a party but the case involves some complaints filed with ECRCO against Mass agencies.)
- Intervenor, Newmont USA Limited v. EPA, No. 04-1069 (Challenge to 2002 NSR reform rule treatment of fugitive emissions)
- Petitioner, State of New York v. EPA, No. 20-1022 (Challenge to 2019 RMP Rule) (consolidated under Air Alliance Houston v. EPA, No. 19-1260)

Added 1/21/21: GAS PROCESSORS ASSOCIATION V. EPA, 11-1023, D.C. Cir.

**From:** [Hoffer, Melissa](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Conrad, Daniel](#); [Payne, James \(Jim\)](#)  
**Subject:** RE: April 14 event at Hampshire  
**Date:** Monday, April 12, 2021 12:20:46 PM

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Thanks Justina. It is in my official capacity, so I would appreciate you reaching out to Dr. Gill to convey that I may not receive the honorarium.

I have accepted another invitation to speak on May 20 on the intersection of public health/EJ/climate for Healthcare Without Harm.

I request that Ethics undertake whatever steps are necessary to clear me to speak at these events. No PowerPoints for either.

Thanks.

Jim—let's get this on the schedule soon, because Dimple and Marianne are both also receiving and accepting speaking invitations.

M

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**From:** Fugh, Justina <Fugh.Justina@epa.gov>  
**Sent:** Monday, April 12, 2021 11:36 AM  
**To:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>  
**Subject:** RE: April 14 event at Hampshire

Hi,

Jim Payne has asked me to drop into one of your front office meetings to explain, briefly, how to approach invitations. Put simply, we differentiate between official duty and personal capacity.

If you are doing this event as part of your official duties (which I expect, as they wrote to you at your EPA email address), then you will be representing EPA, referring to your EPA position/title, and on official time. You absolutely cannot accept the honorarium. You also cannot direct that it be given to a charity at your behest. I can reach out (politely) to Dr. Gill to explain that you are prohibited by 18 USC 209 from receiving this money. Because you are doing the event in your official capacity, we will consider the honorarium to be a supplementation of your salary and thus a violation of 18 USC 209. If official duty, then I expect you followed the invitation clearance process with Dan Conrad, who works with Jennie Keith on Team Ethics.

If, however, you are doing this event in your personal capacity, then you will not be able to refer to your EPA position and title solely, and they should not be using your EPA email



address. Requests for speaking on a topic that relates in significant part to EPA policies, programs or operations requires you to seek prior approval of the outside activity. For this sort of activity, you should consult with Victoria Clarke or me about an outside activity request. If this is an outside activity, and we determine that it is not directly related to EPA policies, programs or operations, then we may determine that you can accept the honorarium. But you would have to report it on your next financial disclosure report and would have to be mindful of the cap on outside earned income for non-career SES appointees.

So just confirm for me whether you are speaking in your official or personal capacity, and I'll follow up.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>

**Sent:** Monday, April 12, 2021 9:40 AM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** FW: April 14 event at Hampshire

Hi Justina,

I did not realize this event would have an honorarium. Any issue here or recommendation?

Thanks.

Melissa

---

**From:** Cynthia Gill <[cjgNS@hampshire.edu](mailto:cjgNS@hampshire.edu)>

**Sent:** Sunday, April 11, 2021 5:51 PM

**To:** Catherine (Craig) Coteus (b) (6)

**Cc:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>

**Subject:** April 14 event at Hampshire

Catherine and Melissa,

Thank you so much for agreeing to speak at the Hampshire College Environments and Change Learning Community Zoom event this coming Wed., April 14. Dula and Sarah will make introductions. We expect to have students, faculty, staff, and alumni attending. The Zoom link is set up as a webinar, so the audience is invisible until the end for Q&A. I'll make

sure you get the Zoom link Monday.

I'm the lead on the E&C faculty group and am arranging for an honorarium to be paid to each of you for speaking.

I need the following information to start the paperwork (I filled in the info for the 2nd half):

**Full Legal Name (no nicknames):**

**Legal address (physical address):**

**Mailing address (if different from legal address):**

**Phone number:**

**Email:**

Start/End dates and times: **Wednesday, April 14 4:00-5:30 pm**

Description of service/itinerary/event: **Environments and Change LC event**

Amount of the Honorarium: **(b) (6)**

Any additional costs that will be covered (i.e. hotel, car rental, airfare): **NA**

Travel Plans: **Zoom event, no travel**

Account that will be paying: **LC account**

Once we have this info, Mary Malo or someone in the business office will contact you with one or two forms to fill out (not as much as for gov't work, I'm sure!)

Thank you, Cynthia Gill

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Cynthia Gill, Ph.D.  
Associate Professor of Physiology  
Natural Science  
Hampshire College  
Amherst, MA 01002



**From:** [Fugh, Justina](#)  
**To:** (b) (6)  
**Subject:** belated greetings!  
**Date:** Thursday, January 14, 2021 12:54:00 AM

---

Hi there,

I heard someone refer to every day in the pandemic as “blursday,” and I certainly feel it. I’m sorry that it’s taken me so long to write back to you!

As I explained, I’m here to help explain the ethics rules that will apply to you when you join EPA as a non-career SES appointee in the Office of General Counsel. Generally speaking, you’ll be subject to two (possibly three) interrelated but different ethical constructs: (1) the federal ethics laws and regulations, (2) your bar rules, and (3) most likely a Biden Ethics Pledge set forth by Executive Order. This note will provide you with the broad brush strokes of what I envision as your ethical obligations.

#### FINANCIAL CONFLICTS OF INTEREST

- You will be required to fill out a public financial disclosure report to help us to ascertain your potential conflicts issues. Put simply, we will be looking at your ownership interests in stocks, bonds, sector mutual funds as well as any fiduciary positions that you hold in entities. This form, called the OGE-278e, is a wretched and exacting document that you will fill out electronically. I’ve assigned you a report using your personal email address for now; later, when you get an EPA email address, I’ll change your user ID. My next message to you will include directions and helpful hints.
- From our discussion, you have (b) (6) This sort of investment does not present conflicts.
- (b) (6) whose assets must be reported on the financial disclosure report. Given your description of your assets, I do not anticipate that you will present any financial conflicts.

#### IMPARTIALITY

- Absent information about a Biden pledge, you will have a “covered relationship” with the State of Massachusetts under the federal ethics regulations at [5 C.F.R. § 2635.502\(b\)\(1\)\(iv\)](#). For one year, you will not be permitted to work on any [specific party matter](#) in which Massachusetts is a party or represents a party unless you first obtain written authorization from an ethics official. See 5 C.F.R. § 2635.502(d). Just so you know, we are quite likely to grant such a determination so long as you did not work personally and substantially on the underlying matter.
- For definitions of “specific party matter” and “personal and substantial participation,” please see [5 C.F.R. § 2641.201](#). Although I’m citing the post-employment regulations, these definitions are the most recent articulation of the concepts by the Office of Government Ethics and apply also to the impartiality and financial conflict of interest regulations.

#### RECUSALS

- I anticipate that your recusal statement will address only those specific party matters

that are still pending at EPA in which you participated personally and substantially on behalf of a former employer. As you will expect, you will have bar obligations regarding those cases anyway. If you could remind me what the likely two cases are, we can incorporate them into your draft recusal statement.

That's my quick overview, but I tried not to burden you with attachments or citations. I can provide you more information if you want, though, so just ask!

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

**From:** [Hoffer, Melissa](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Payne, James \(Jim\)](#); [Clarke, Victoria](#); [Cole, Joseph E.](#)  
**Subject:** Re: confirmation that you may participate in the 2nd Cir challenge to methylene chloride rule  
**Date:** Thursday, February 11, 2021 10:33:40 PM

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Thanks both, and yes, Jim, that is my memory.

Sent from my iPhone

On Feb 11, 2021, at 6:33 PM, Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)> wrote:

Hi Melissa,

We were asked to determine whether you may participate in a challenge to methylene chloride rule, *Labor Council for Latin America, NRDC, et al. v. EPA*, Case No. 19-1042, 2d Cir.). Both Dimple and Marianne are recused from this case. I am writing to confirm that you may participate. In coming to this determination, we did consider that you are recused from another specific party matter involving the same rule, but that case is in the 9<sup>th</sup> Circuit. Therefore, for ethics purposes, the 2<sup>nd</sup> Circuit case is a different specific party matter, and you do not have any recusal issues related to it.

Sorry to add yet another meeting to your list, but there is no ethics barrier to your participation in the *Labor Council* case.

Justina


Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

ho

**From:** [Melissa Hoffer](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Payne, James \(Jim\)](#)  
**Subject:** Re: determination about making policy decisions in MA cases  
**Date:** Tuesday, January 19, 2021 10:37:23 PM  
**Attachments:** [enclosure to impartiality determination 1-19-21-1 MAH 1-19-21.docx](#)

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Thank you, Justina, very much, and especially for the quick turnaround. The letter looks great. I added a few matters to the enclosure and made a few minor changes (see attached). (b) (5)



Thanks again,  
Melissa

On Tue, Jan 19, 2021 at 6:58 PM Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)> wrote:

Hi there,

Attached is the impartiality determination that will allow you to make policy decisions about certain cases pending before the EPA in which Massachusetts is a party or intervenor.

Looking forward to working with you soon,

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

**From:** [Fugh, Justina](#)  
**To:** [Melissa Hoffer](#)  
**Cc:** [Payne, James \(Jim\)](#)  
**Subject:** determination about making policy decisions in MA cases  
**Date:** Tuesday, January 19, 2021 6:57:00 PM  
**Attachments:** [impartiality determination 1-19-21.docx](#)  
[enclosure to impartiality determination 1-19-21.docx](#)

---

Hi there,

Attached is the impartiality determination that will allow you to make policy decisions about certain cases pending before the EPA in which Massachusetts is a party or intervenor.

Looking forward to working with you soon,

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

**From:** [Fugh, Justina](#)  
**To:** [Hoffer, Melissa](#)  
**Cc:** [Payne, James \(Jim\)](#); [Dierker, Carl](#)  
**Subject:** RE: Exigent Issue / Follow-up  
**Date:** Tuesday, March 30, 2021 3:39:00 PM  
**Attachments:** [Waiver Letter J. Fugh FNL 30March2021.pdf](#)

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Hi there,

In the event that you wish to participate in the Merrimack Station specific party matter currently pending before EPA, attached is the letter of informed consent from CLF to EPA to permit you to do so. Of course, it's still up to you to determine whether or not you wish to participate, given the crush of your other duties. But if you do wish to participate, your former employer/client has consented to allow you to do so.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Bradley Campbell <(b) (6)@clf.org>  
**Sent:** Monday, March 29, 2021 2:28 PM  
**To:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>  
**Cc:** (b) (6)@CLF.org; Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>  
**Subject:** Re: Exigent Issue / Follow-up

Thank you, Melissa. We are happy to waive the conflict and happy to follow up with Jim.

Sent from my iPad

On Mar 29, 2021, at 14:18, Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)> wrote:

CAUTION: Email from outside CLF.

Hi Brad and Tom,

As Tom may recall, I worked extensively on the Merrimack NPDES while I was employed by CLF. Having reviewed the applicable NH ethical requirements, I am conflicted from this matter absent a waiver from CLF.

In the interest of time, I have copied here my colleague Jim Payne would can follow up

with you directly.

Thanks,  
Melissa

Sent from my iPhone

On Mar 25, 2021, at 3:09 PM, Bradley Campbell <(b) (6) @clf.org> wrote:

Dear Melissa:

Congratulations on your new post — what a godsend for environmental protection. And thank you for your timely response to my call.

You probably have some recollection of Merrimack Station in New Hampshire, one of the two coal plants left in New England. Merrimack still uses once-through cooling, and late in the Obama Administration Region 1 issued a draft permit that would have required cooling towers to avert the significant harm the plant's discharges are causing to the Merrimack River and its living resources. The cost of the towers is almost certainly prohibitive for continued operation of the plant.

EPA staff have indicated that Region I has apparently made the decision *not* to revisit/revise the Trump EPA's decision in the Merrimack Station NPDES permit to not require cooling towers (though it's considering a minor amendment related to leachate). Notably, Eversource divested the plant while the Obama draft permit was pending, so EPA's retreat from cooling tower requirement would essentially create a windfall with the new owner at the expense of the river and its living resources. **We have been told the final permit will issue soon.**

I think it would be unfortunate if the Biden Administration were to retreat from the position struck by the Obama EPA and give new life to this coal plant, and I'd hate to have our first advocacy concerning a Biden Administration permit decision be at all negative .

We would love to make the case to you or the appropriate EPA official that the anticipated decision to adopt the Trump Administration's position on cooling towers would be arbitrary, capricious, and contrary to law. Feel free to call me for TOM for additional information.

[N.B. CLF and Sierra Club have a pending Clean Water Act citizen suit (EPA is not a party) to address the plant's violations of its current permit]

Brad

**Bradley M. Campbell**  
President  
Conservation Law Foundation

62 Summer Street  
Boston, MA 02110

P: 617-850-1786

M: (b) (6)

E: (b) (6) [@clf.org](mailto:(b)(6)@clf.org)

For a thriving New England



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For a thriving New England

Office of the President 62 Summer Street  
Boston, MA 02110  
P: 617.850.1786  
F: 617.350.4030  
www.clf.org

**Via electronic mail**  
Fugh.Justina@epa.gov

March 30, 2021

Justina Fugh  
Director, Ethics Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
Mail Code 2311A, Room 4308 North  
William Jefferson Clinton Federal Building  
Washington, DC 20460

Dear Ms. Fugh:

Pursuant to your electronic mail communication of March 29, 2021, and after a thorough review of the matter, Conservation Law Foundation (CLF) consents to Acting General Counsel Melissa Hoffer's participation in matters concerning or related to EPA's final National Pollutant Discharge Elimination System (NPDES) permit for the Merrimack Station generating facility in New Hampshire. While we regard the currently pending final NPDES permit as presenting a different particular matter than those in which Acting General Counsel Hoffer was involved, CLF nonetheless gives our waiver and unqualified consent as to any potential conflict of interest concerning Acting General Counsel Hoffer's involvement in the matter.

We appreciate your close attention to the conflict issue and your consideration of our consent.

Sincerely,

A handwritten signature in blue ink, appearing to read "Brad Campbell", is written over a light blue rectangular background.

Brad Campbell  
President

**From:** [Hoffer, Melissa](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Payne, James \(Jim\)](#); [Dierker, Carl](#)  
**Subject:** Re: Exigent Issue / Follow-up  
**Date:** Tuesday, March 30, 2021 3:41:09 PM

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Thank you, Justina.

Carl/Jim, I would like to discuss. Can we please find a time?

Sent from my iPhone

On Mar 30, 2021, at 3:39 PM, Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)> wrote:

Hi there,

In the event that you wish to participate in the Merrimack Station specific party matter currently pending before EPA, attached is the letter of informed consent from CLF to EPA to permit you to do so. Of course, it's still up to you to determine whether or not you wish to participate, given the crush of your other duties. But if you do wish to participate, your former employer/client has consented to allow you to do so.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Bradley Campbell <(b) (6)@clf.org>  
**Sent:** Monday, March 29, 2021 2:28 PM  
**To:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>  
**Cc:** (b) (6)@CLF.org; Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>  
**Subject:** Re: Exigent Issue / Follow-up

Thank you, Melissa. We are happy to waive the conflict and happy to follow up with Jim.

Sent from my iPad

On Mar 29, 2021, at 14:18, Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)> wrote:

CAUTION: Email from outside CLF.

Hi Brad and Tom,

As Tom may recall, I worked extensively on the Merrimack NPDES while I was employed by CLF. Having reviewed the applicable NH ethical requirements, I am conflicted from this matter absent a waiver from CLF.

In the interest of time, I have copied here my colleague Jim Payne would can follow up with you directly.

Thanks,  
Melissa

Sent from my iPhone

On Mar 25, 2021, at 3:09 PM, Bradley Campbell  
<(b) (6) [@clf.org](mailto:_____@clf.org)> wrote:

Dear Melissa:

Congratulations on your new post — what a godsend for environmental protection. And thank you for your timely response to my call.

You probably have some recollection of Merrimack Station in New Hampshire, one of the two coal plants left in New England. Merrimack still uses once-through cooling, and late in the Obama Administration Region 1 issued a draft permit that would have required cooling towers to avert the significant harm the plant's discharges are causing to the Merrimack River and its living resources. The cost of the towers is almost certainly prohibitive for continued operation of the plant.

EPA staff have indicated that Region I has apparently made the decision *not* to revisit/revise the Trump EPA's decision in the Merrimack Station NPDES permit to not require cooling towers (though it's considering a minor amendment related to leachate). Notably, Eversource divested the plant while the Obama draft permit was pending, so EPA's retreat from

cooling tower requirement would essentially create a windfall with the new owner at the expense of the river and its living resources. **We have been told the final permit will issue soon.**

I think it would be unfortunate if the Biden Administration were to retreat from the position struck by the Obama EPA and give new life to this coal plant, and I'd hate to have our first advocacy concerning a Biden Administration permit decision be at all negative .

We would love to make the case to you or the appropriate EPA official that the anticipated decision to adopt the Trump Administration's position on cooling towers would be arbitrary, capricious, and contrary to law. Feel free to call me for TOM for additional information.

[N.B. CLF and Sierra Club have a pending Clean Water Act citizen suit (EPA is not a party) to address the plant's violations of its current permit]

Brad

**Bradley M. Campbell**  
President  
Conservation Law Foundation

62 Summer Street  
Boston, MA 02110

P: 617-850-1786  
M: (b) (6)  
E: (b) (6) [@clf.org](mailto:(b) (6)@clf.org)

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and destroy this e-mail and all copies of it.

<Waiver Letter\_J. Fugh\_FNL\_30March2021.pdf>

**From:** [Fugh, Justina](#)  
**To:** [Hoffer, Melissa](#)  
**Subject:** RE: External Communications  
**Date:** Friday, January 22, 2021 12:49:00 PM

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Hi,

You might want to check with Dan Conrad, Jim or Elise on their front office protocols. From an ethics perspective, we don't require that level of granularity at all.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>

**Sent:** Friday, January 22, 2021 12:37 PM

**To:** Fugh, Justina <Fugh.Justina@epa.gov>

**Subject:** External Communications

Hi Justina,

Are we supposed to log or otherwise record external communications?

Thank you,

Melissa

**From:** [Fugh, Justina](#)  
**To:** [Engelman-Lado, Marianne](#); [Hoffer, Melissa](#)  
**Cc:** [Packard, Elise](#)  
**Subject:** RE: Follow up: CCILO comments on draft Science Transparency Rule  
**Date:** Friday, March 05, 2021 10:14:00 AM

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Hi,

I wasn't asked by CCILO about Melissa's participation, and I haven't seen the document that Noelle referenced. What I can do going forward, though, is to remind our friends in CCILO that they may ask OGC/Ethics directly about recusal issues rather than rely on you, Marianne, to ask Melissa yourself. There are so many nuances in individual recusals that we strongly recommend asking us rather than the individual.

That said, Melissa's understanding of her recusal obligations is correct: she is recused from specific party matters in which she formerly participated but not from working on matters of general applicability, such as rulemaking or policy matters.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Engelman-Lado, Marianne <EngelmanLado.Marianne@epa.gov>  
**Sent:** Friday, March 05, 2021 10:09 AM  
**To:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>  
**Cc:** Packard, Elise <Packard.Elise@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>  
**Subject:** RE: Follow up: CCILO comments on draft Science Transparency Rule

Justina, should we wait to hear back from you on this?

Otherwise, Melissa, I can let the team know that we're waiting to clarify whether you're recused and Elise and I can carry the ball until then.

Best,

Marianne

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**From:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>  
**Sent:** Friday, March 5, 2021 9:56 AM  
**To:** Engelman-Lado, Marianne <[EngelmanLado.Marianne@epa.gov](mailto:EngelmanLado.Marianne@epa.gov)>  
**Cc:** Packard, Elise <[Packard.Elise@epa.gov](mailto:Packard.Elise@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** RE: Follow up: CCILO comments on draft Science Transparency Rule

My understanding is that I may **\*not\*** engage matters related to the litigation, but am able to engage policy considerations, e.g., a subsequent rulemaking, etc.

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**From:** Engelman-Lado, Marianne <[EngelmanLado.Marianne@epa.gov](mailto:EngelmanLado.Marianne@epa.gov)>

**Sent:** Thursday, March 4, 2021 11:58 AM

**To:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>

**Cc:** Packard, Elise <[Packard.Elise@epa.gov](mailto:Packard.Elise@epa.gov)>

**Subject:** Follow up: CCILO comments on draft Science Transparency Rule

Melissa,

This is another follow up to the CCILO meeting yesterday. There wasn't clarity about whether you are recused from the rule, as opposed to the litigation and/or whether Elise or I should play a role.

Thanks,

Marianne

---

**From:** Green, Noelle <[Green.Noelle@epa.gov](mailto:Green.Noelle@epa.gov)>

**Sent:** Thursday, March 4, 2021 11:54 AM

**To:** Packard, Elise <[Packard.Elise@epa.gov](mailto:Packard.Elise@epa.gov)>; Engelman-Lado, Marianne <[EngelmanLado.Marianne@epa.gov](mailto:EngelmanLado.Marianne@epa.gov)>

**Cc:** Simons, Andrew <[Simons.Andrew@epa.gov](mailto:Simons.Andrew@epa.gov)>; Sheppard, Tracy <[Sheppard.Tracy@epa.gov](mailto:Sheppard.Tracy@epa.gov)>; Serassio, Helen <[Serassio.Helen@epa.gov](mailto:Serassio.Helen@epa.gov)>

**Subject:** CCILO comments on

Elise and Marianne,

Per your request, please see attached for the comments CCILO provided to ORD on the draft Science Transparency Vacatur Rule and related options selection paper. Please note I am not sending to the entire FO group given that Marianne was going to check with Melissa to confirm that she is not recused from the matter before providing her with our comments.

Thank you,

*Noelle Green*

Attorney-Advisor

Cross-Cutting Issues Law Office

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, Northwest

Washington, DC 20460

(202) 564-1236



[green.noelle@epa.gov](mailto:green.noelle@epa.gov)

**From:** [Hoffer, Melissa](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Payne, James \(Jim\)](#); [Packard, Elise](#); [OGC Ethics](#)  
**Subject:** Re: Impartiality determination (and case list) for Melissa Hoffer  
**Date:** Thursday, January 21, 2021 1:52:59 PM

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Many thanks, Justina.

Melissa

Sent from my iPhone

On Jan 21, 2021, at 9:53 AM, Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)> wrote:

Huh. I have no idea why I attached the list twice. There's no difference between them; I just was click happy!

---

**From:** Fugh, Justina

**Sent:** Thursday, January 21, 2021 9:52 AM

**To:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>; Packard, Elise <[Packard.Elise@epa.gov](mailto:Packard.Elise@epa.gov)>; Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>

**Cc:** OGC Ethics <[OGC\\_Ethics@epa.gov](mailto:OGC_Ethics@epa.gov)>

**Subject:** Impartiality determination (and case list) for Melissa Hoffer

Hi there,

Attached is the limited impartiality determination that permits Melissa Hoffer to participate in making policy decisions only related to cases in which her former employer/client, the Commonwealth of Massachusetts, is a party or intervenor. Irrespective of whether she participated herself personally and substantially in those cases, I have determined that she may participate in making "policy decisions as to whether or not to pursue current litigation." Because this letter was issued to her prior to joining federal service, it contained personal privacy information that has been redacted. Please note that this determination is limited and does not allow her to participate generally with the Commonwealth of Massachusetts on other specific party matters. Should that need arise, we will have to consider another impartiality determination.

Attached is the version of the limited impartiality determination that can be distributed broadly (with grateful thanks to Shannon for figuring out how to redact portions of a signed pdf).

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

**From:** [Hoffer, Melissa](#)  
**To:** [Payne, James \(Jim\)](#); [Chaudhary, Dimple](#); [Engelman-Lado, Marianne](#); [Fugh, Justina](#)  
**Subject:** (b) (5)  
**Date:** Sunday, January 24, 2021 6:22:16 PM

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Thanks, Jim.

I am recused from that call (b) (5)

(b) (5)  
(b) (5)  
(b) (5)

Thanks,  
Melissa

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**From:** Payne, James (Jim) <payne.james@epa.gov>  
**Sent:** Saturday, January 23, 2021 9:42 PM  
**To:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>; Chaudhary, Dimple <Chaudhary.Dimple@epa.gov>; Engelman-Lado, Marianne <EngelmanLado.Marianne@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>

**Subject:** (b) (5)

(b) (5)  
(b) (5)  
(b) (5)  
(b) (5)

(b) (5)  
(b) (5)

Subject to Justina check as to any recusals, (b) (5)

(b) (5)

Jim

(b) (6) cell

Sent from my iPhone

Begin forwarded message:

**From:** (b) (6)  
**Date:** January 22, 2021 at 2:00:39 PM EST  
**To:** "Payne, James (Jim)" <[payne.james@epa.gov](mailto:payne.james@epa.gov)>, (b) (6)  
(b) (6)  
(b) (6)  
"Srinivasan, Gautam" <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>, "Marks, Matthew" <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Cc:** (b) (6)  
(b) (6)  
(b) (6)  
**Subject:** RE: SAFE 2

Jim,

(b) (5)

**From:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>

**Sent:** Friday, January 22, 2021 1:43 PM

**To:** (b) (6)

Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>;

Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>

**Cc:** (b) (6)

**Subject:** Re: SAFE 2

Thank you for contacting us. Adding Eric and others. Eric might have a suggestion here, as ordinarily he or his office would take lead in setting up litigation-related call. Jim

(b) (6) cell

Sent from my iPhone

On Jan 22, 2021, at 1:39 PM, Segall, Craig@ARB

(b) (6) > wrote:

Privileged/Confidential – Settlement Communication

Dear Jim,

Good speaking with you just now. As I noted, CARB would like to request a discussion on the SAFE 2 case's legal posture prior to US DOJ filing a request for abeyance in that case, given certain interactions between the litigation and the policy priorities articulated by the new Administration. I am free to discuss before 2 pm Eastern today, over the weekend, or almost any time on Monday. I am ccing Ellen Peter, Chief Counsel, and Elaine Meckenstock, our litigation counsel at Cal DOJ. Thanks for including appropriate DOJ counsel.

Thanks,

Craig

Craig Segall  
Assistant Chief Counsel  
California Air Resources Board  
1001 I Street Sacramento, CA 95814

<image001.png>

VOIP: (b) (6)

(b) (6)

Pronouns: he/him

**From:** [Fugh, Justina](#)  
**To:** [Cole, Joseph E.](#); [Payne, James \(Jim\)](#)  
**Cc:** [Clarke, Victoria](#); [Fisher, Bethany](#)  
**Subject:** Melissa Hoffer may participate in the 1,4-dioxane suit filed 3/22/21  
**Date:** Wednesday, March 24, 2021 9:44:03 PM  
**Attachments:** [Impartiality determination for Massachusetts.pdf](#)

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See the advice that I conveyed to Melissa earlier tonight.

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**From:** Fugh, Justina  
**Sent:** Wednesday, March 24, 2021 9:43 PM  
**To:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>  
**Subject:** RE: Should this case be added to your recusal list?

Hi,

We granted you a second impartiality determination (see attached) that authorizes you “to participate in new or future specific party matters that involve the Commonwealth of Massachusetts, but not on the very same specific party matters on which you worked on personally and substantially while employed by the Massachusetts Attorney General’s Office.” Because you did not participate personally and substantially in the TSCA section 6(i) order in the 1,4-dioxane risk evaluation, you are not subject to a one-year cooling off period with MA because of the impartiality determination we issued. And, though I can’t give you bar advice, please refer to [MA bar rule 1.11](#), which provides that a “lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9(c) [duty to former client]; and (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.” Again, because you did not participate in the case while with MA, you have no bar restriction from participating now.

I’ll let Jim Payne and Joe Cole know that you may participate in this new suit filed on March 22, 2021 in the 9<sup>th</sup> circuit.

Sorry, more work for you!

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>  
**Sent:** Wednesday, March 24, 2021 9:16 PM  
**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Subject:** Re: Should this case be added to your recusal list?

I did not work on it, but I think there is the one year bar?

Sent from my iPhone

On Mar 24, 2021, at 8:34 PM, Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)> wrote:

Hi Melissa,

On March 22, 2021, several petitioners, including the Commonwealth of Massachusetts, filed suit in the 9th Circuit to review the TSCA section 6(i) “no unreasonable risk” order in the 1,4-dioxane risk evaluation. The case number is not yet assigned, but do you recall whether you worked personally and substantially on this matter prior to leaving MA? If so, then we’ll need to add it to your recusal list.

Thanks!

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

**From:** [Fugh, Justina](#)  
**To:** [Hoffer, Melissa](#)  
**Subject:** signed impartiality determination for MA  
**Date:** Tuesday, February 02, 2021 12:15:00 AM  
**Attachments:** [Impartiality determination for Massachusetts.pdf](#)

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Hi there,

Attached please find the signed impartiality determination to allow you to participate in specific party matters with your former employer, the Commonwealth of Massachusetts. This determination allows you to interact with MA on those matters that you did not previously participate. We don't yet have your financial disclosure report, but we anticipate that you have a defined contribution plan. Those do not present any financial conflict of interest. Even if you have a defined benefit plan, there is still no financial conflict of interest pursuant to 5 CFR 2640.201(c)(1)(ii), which provides an exemption for state benefit plans. I'll send the impartiality determination to the cc's and to the ADDs under separate cover.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772





**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

February 2, 2021

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Impartiality Determination to Participate in Certain Matters Involving the Commonwealth of Massachusetts

**FROM:** Justina Fugh, Alternate Designated Agency Ethics Official and Director, Ethics Office

Digitally signed by Justina Fugh  
Date: 2021.02.02  
00:03 39 -05'00'

**TO:** Melissa Hoffer  
Acting General Counsel

As the Acting General Counsel of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the Commonwealth of Massachusetts. Within the last year, prior to being selected for this position, you served as the Chief of the Energy and Environment Bureau with the Massachusetts Attorney General's Office.

On January 20, 2021, you were appointed to the position of EPA's Principal Deputy General Counsel. The Acting Administrator approved that appointment on January 28, 2021. Based upon your appointment as the first assistant to the EPA General Counsel, you automatically became the Acting EPA General Counsel as a matter of law under 5 U.S.C. § 3345(a)(1). An incoming Principal Deputy General Counsel, appointed to that position after the General Counsel vacancy arises, may automatically serve in an acting capacity. *See* Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179 (2001).

Under President Biden's Ethics Pledge, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state government is excluded under the definition of "former employer."<sup>1</sup> Therefore the Ethics Pledge does not apply to your Massachusetts employment. Federal ethics rules, however, do not contain a similar exclusion for state government, so those rules do apply to your prior employment with the Commonwealth of Massachusetts.

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." You have a "covered

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<sup>1</sup> *See* Exec. Order 13989, Section 2(k), which provides that "'former employer' does not include...State or local government."

relationship” with the Commonwealth of Massachusetts under 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date your employment with the Attorney General’s Office terminated, absent an impartiality determination from me, you cannot participate in any specific party matter in which the Commonwealth of Massachusetts is a party or represents a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee’s participation outweighs concern over the questioning of the “integrity of the agency’s programs and operations.” 5 C.F.R. § 2635.502(d). The factors that we take into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee’s role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee’s duties that would reduce or eliminate the likelihood that a reasonable person would question the employee’s impartiality.

As Acting General Counsel, you are the chief legal advisor to the Agency and part of the Agency’s political leadership. In your current role as Acting General Counsel, and in your role as Principal Deputy General Counsel if you revert back within a year, you are expected to communicate freely with states, and you will be asked to participate in discussions and meetings related to particular matters that affect the Commonwealth of Massachusetts. Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as part of your official EPA duties in particular matters that involve the Commonwealth of Massachusetts with the following limitation: you must recuse yourself from participation in specific party matters in which you participated personally and substantially while employed with the Attorney General’s Office.

In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2015, you have served as the Chief of the Energy and Environment Bureau with the Massachusetts Attorney General’s Office. In this role, you oversaw the Bureau’s attorneys on matters including prosecuting civil and criminal enforcement of environmental laws, energy policy, ratepayer advocacy, defensive cases, and affirmative advocacy. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for the Attorney General’s Office. States share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with state governmental entities on a continuing and frequent basis.

Effect of the matter upon your financial interest – We have determined that you do not have any significant financial interest in the Commonwealth of Massachusetts, so you do not have any conflicting financial interest.

Nature and importance of the employee's role – As the Acting General Counsel, you are the chief legal advisor to the Agency. Among other things, OGC lawyers provide legal counsel to EPA policymakers, shape national legislation affecting the environment, and provide legal support for the issuance of permits, the approval of environmental programs, and the initiation and litigation of enforcement actions. As Acting General Counsel, or as Principal Deputy General Counsel if you should revert back within a year, you are expected to communicate freely with states, including Massachusetts.

Sensitivity of the matter – We anticipate that there may be specific party matters in which you did not participate personally and substantially for the Massachusetts Attorney General's Office that will rise to your level of attention, merit your participation, and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as part of your official duties as Acting General Counsel, or as Principal Deputy General Counsel if you should revert back to those duties within the year, in such matters will be of importance to the Acting Administrator and the confirmed Administrator and, therefore, is in the Agency's interests. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, you are authorized to participate in new or future specific party matters that involve the Commonwealth of Massachusetts, but not on the very same specific party matters on which you worked on personally and substantially while employed by the Massachusetts Attorney General's Office. If the Agency determines that it has a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis. Unless and until you receive written authorization, you must continue to recuse yourself from those matters in which you had previously participated while OGC/Ethics considers whether the Agency's interest in your participation outweighs any impartiality concern.

You are also cognizant of your attorney bar rules that prohibit you from participating in any matter that is the same or substantially related to the same specific party matter that you previously participated in personally and substantially, unless your bar provides for and you first obtain informed consent and notify OGC/Ethics. On January 19, 2021, I issued you an impartiality determination allowing you to participate in discussions and meetings related to the policy decisions for those cases that may affect or involve the Commonwealth of Massachusetts and in which you may have participated personally and substantially. However, you were reminded not to participate in the merits of those cases nor to reveal any client confidences.

While I have issued you this determination to interact with the Commonwealth of Massachusetts with the limitation described above, you may wish to make adjustments to your duties to not participate in a particular matter that involves Massachusetts. Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters, although you are advised to confer with OGC/Ethics should such a circumstance arise.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact me at [fugh.justina@epa.gov](mailto:fugh.justina@epa.gov) or (202) 564-1786.

cc: Dimple Chaudhary, Deputy General Counsel for Nationwide Resource Protection  
Jim Payne, Deputy General Counsel for Environmental Media and Regional Law Offices  
Elise Packard, Deputy General Counsel for Operations Programs  
Daniel H. Conrad, Acting Associate Deputy General Counsel

**From:** [Fugh, Justina](#)  
**To:** [Hoffer, Melissa](#)  
**Subject:** RE: Should this case be added to your recusal list?  
**Date:** Wednesday, March 24, 2021 9:42:00 PM  
**Attachments:** [Impartiality determination for Massachusetts.pdf](#)

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Hi,

We granted you a [second impartiality determination](#) (see attached) that authorizes you “to participate in new or future specific party matters that involve the Commonwealth of Massachusetts, but not on the very same specific party matters on which you worked on personally and substantially while employed by the Massachusetts Attorney General’s Office.” Because you did not participate personally and substantially in the TSCA section 6(i) order in the 1,4-dioxane risk evaluation, you are not subject to a one-year cooling off period with MA because of the impartiality determination we issued. And, though I can’t give you bar advice, please refer to [MA bar rule 1.11](#), which provides that a “lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9(c) [duty to former client]; and (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.” Again, because you did not participate in the case while with MA, you have no bar restriction from participating now.

I’ll let Jim Payne and Joe Cole know that you may participate in this new suit filed on March 22, 2021 in the 9<sup>th</sup> circuit.

Sorry, more work for you!

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>  
**Sent:** Wednesday, March 24, 2021 9:16 PM  
**To:** Fugh, Justina <Fugh.Justina@epa.gov>  
**Subject:** Re: Should this case be added to your recusal list?

I did not work on it, but I think there is the one year bar?

Sent from my iPhone

On Mar 24, 2021, at 8:34 PM, Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)> wrote:

Hi Melissa,

On March 22, 2021, several petitioners, including the Commonwealth of Massachusetts, filed suit in the 9th Circuit to review the TSCA section 6(i) “no unreasonable risk” order in the 1,4-dioxane risk evaluation. The case number is not yet assigned, but do you recall whether you worked personally and substantially on this matter prior to leaving MA? If so, then we’ll need to add it to your recusal list.

Thanks!

Justina

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**From:** [Fugh, Justina](#)  
**To:** [Hoffer, Melissa](#)  
**Subject:** RE: Merrimack issue follow-up  
**Date:** Monday, March 29, 2021 11:45:00 AM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[image003.jpg](#)  
[image004.png](#)  
[image005.jpg](#)

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Hi there,

I looked at the NH bar rule 1.9, duty to former client, and based on my read (though, admittedly, I don't provide bar advice), I recommend that you do not participate unless you first obtain the consent, in writing, from the CLF.

Justina

## **NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT**

### **CLIENT-LAWYER RELATIONSHIP**

#### **Rule 1.9. Duties to Former Clients**

**(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.**

**(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:**

**(1) whose interests are materially adverse to that person; and**

**(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.**

**(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:**

**(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or**

**(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.**

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**From:** Fugh, Justina  
**Sent:** Sunday, March 28, 2021 7:56 PM  
**To:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>

**Subject:** RE: Merrimack issue follow-up

Sure, or if you want to take care of it tonight, we can. I didn't notice that "Merrimack," "Hookset" or even "Conservation Law Foundation" showed up on your list of cases related to any cooling towers. Are you concerned about your possible bar obligations?

justina

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**From:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>

**Sent:** Sunday, March 28, 2021 7:15 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** FW: Merrimack issue follow-up

Hi Justina,

Could we take a moment on this tomorrow—thanks.

Melissa

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**From:** Bradley Campbell <(b) (6)@clf.org>

**Sent:** Thursday, March 25, 2021 4:16 PM

**To:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>

**Cc:** (b) (6)@CLF.org

**Subject:** Merrimack issue follow-up

Further from Tom. My message failed to make clear that the Trump change was in the final permit now under appeal, and the Trump change was not subject to public comment

Begin forwarded message:

**From:** Tom Irwin <(b) (6)@clf.org>

**Subject:** RE: Exigent Issue / Follow-up

**Date:** March 25, 2021 at 3:44:45 PM EDT

**To:** Bradley Campbell <(b) (6)@clf.org>

This is great, Brad. Many thanks. Melissa's response may be that EPA changed course on the cooling towers because of Merrimack's low capacity factor. If so, we can inform



her of our pending appeal, in which we argue that regardless of the capacity factor, the permit will not support a balanced indigenous population in the affected stretch of the Merrimack (the Hooksett Pool) and that as a matter of law EPA should have conducted a public comment process when it amended the permit to no longer require cooling towers. There's much more to our petition for review which, prepared by Reed Super, is comprehensive (and complex). Also, if helpful, Reed prepared the following bullets, to be used for internal purposes, describing the sequence of events during the permitting process and where we are now:

- 2011: [Obama] EPA issues draft permit for public comment; SC, CLF and other environmental groups approve and ask EPA to move forward to finalize it.
- 2014: [Obama] EPA issues revised draft permit; same response from enviros.
- [2017 comment period is in here, but I think you can leave out; there was no new draft permit]
- 2018: Private equity company bought Station from PSNH
- 2018-2020: Company and [Trump] EPA meet frequently to discuss changes to permit; we learn through FOIA that they are meeting and exchanging "discussion drafts"; we again ask EPA to finalize the 2011/2014 permit they took public comment on, or if EPA intends to go in a radically new direction at the behest of the private equity company, we ask them to issue a new draft permit, explaining their purported rationale, for public comment; we get no response
- 2020: [Trump] EPA issues radically different FINAL permit that is much weaker than 2011/2014 drafts, without issuing a new draft for public comment; the FINAL permit weakens intake, thermal discharge, and other requirements, and even removes standard narrative limitations on the thermal plume that the Station has been subject to since 1992 [imposed by Geo. H.W. Bush's EPA] and which EPA of many administrations has included in the permits for most riverine power plants in New Hampshire and Massachusetts for decades.
- SC and CLF appealed the permit to the EPA Environmental Appeals Board in 2020; [Trump] EPA and the private equity company filed brief defending the permit in 2020.
- After election, [Biden] EPA files motion with Board, citing Executive

Order No. 13990, "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021), which directs EPA to examine whether its past actions are consistent with improving public health and protecting our environment and to "consider suspending, revising, or rescinding" those actions that are not; Board gives EPA until April 19, 2021 to brief the incoming EPA leadership and either file a motion requesting that EPA wants to revoke or otherwise reconsider the permit, or go forward and defend the [Trump] EPA's permit.

**EPA should not defend the 2020 permit; it should seek a "voluntary remand" and either go back to the 2011/2014 permit or, at a minimum, issue any changes in a draft permit for public comment.**

Best,  
Tom

**Tom Irwin**  
Vice President  
Director, CLF New Hampshire

27 North Main Street  
Concord, NH 03301-4930

P: (b) (6)  
E: (b) (6)@clf.org



**From:** [Hoffer, Melissa](#)  
**To:** [Fugh, Justina](#)  
**Subject:** RE: Need to speak briefly  
**Date:** Friday, January 22, 2021 12:40:46 PM

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Thank you, Justina.

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Sent:** Friday, January 22, 2021 9:43 AM  
**To:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>  
**Subject:** RE: Need to speak briefly

Hi Melissa,

This note confirms the oral advice I provided. You asked whether you may participate in meetings or discussions related to how the agency will proceed on rulemaking, for example, if that rulemaking was the subject of litigation from which you are recused. I confirmed that you may indeed work on that rulemaking. Your recusal is focused only on those specific party matters that you previously worked on for the Commonwealth of Massachusetts, which are the lawsuits themselves. That the suits concerned agency rulemaking does not preclude your ability to now work on the rulemaking itself, so long as you don't divulge your former client's secrets.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>  
**Sent:** Friday, January 22, 2021 9:18 AM  
**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Subject:** Need to speak briefly

What is the best number to reach you?

Thanks,  
Melissa

**From:** [Melissa Hoffer](#)  
**To:** [Fugh, Justina](#)  
**Subject:** Re: Time Sensitive Ethics Question  
**Date:** Tuesday, January 19, 2021 9:38:47 AM

---

Yes, will call then. Thank you.

On Mon, Jan 18, 2021 at 7:21 PM Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)> wrote:

Hi there,

Sure, 9:45 will be fine with me. Could you call me on my land line, which is (b) (6) ?

Justina

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**From:** Melissa Hoffer <[melissa.hoffer@gmail.com](mailto:melissa.hoffer@gmail.com)>  
**Sent:** Monday, January 18, 2021 5:44 PM  
**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Subject:** Time Sensitive Ethics Question

Hi Justina,

I wanted to run something by you briefly. Could you speak at 9:45 or noon tomorrow?

Thanks and regards,

Melissa Hoffer

**From:** [Hoffer, Melissa](#)  
**To:** [Orlin, David](#)  
**Cc:** [Fugh, Justina](#); [Srinivasan, Gautam](#)  
**Subject:** Re: Trailers  
**Date:** Thursday, February 11, 2021 11:08:11 AM

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As I understand, if MA is a party, I am recused from discussion of litigation strategy but not policy (b) (5)

Justina, would you please confirm. Thanks.

Sent from my iPhone

On Feb 11, 2021, at 10:46 AM, Orlin, David <[Orlin.David@epa.gov](mailto:Orlin.David@epa.gov)> wrote:

Hi Melissa,

The case is TTMA v EPA, DC Circuit no. 16-1430. Massachusetts did not challenge the regulation but is a party to the litigation as an intervenor-respondent, so it would be good for me to know if that avoids recusal issues.

David Orlin

U.S. EPA, Office of General Counsel

(202) 564-1222

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**From:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>

**Sent:** Thursday, February 11, 2021 10:14 AM

**To:** Orlin, David <[Orlin.David@epa.gov](mailto:Orlin.David@epa.gov)>

**Cc:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** Trailers

Hi David,

I want to double check on my recusal status for this one. Do you happen to have the docket and number and/or know if the Commonwealth of MA challenged? I do not recall, but don't think so. Thanks.

Melissa

**From:** [Hoffer, Melissa](#)  
**To:** [Orlin, David](#)  
**Cc:** [Fugh, Justina](#); [Srinivasan, Gautam](#)  
**Subject:** Re: Trailers  
**Date:** Thursday, February 11, 2021 11:32:52 AM

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My understanding from Ann is that this meeting is to (b) (5), so I will  
\*not\* be joining.

Sent from my iPhone

On Feb 11, 2021, at 10:46 AM, Orlin, David <Orlin.David@epa.gov> wrote:

Hi Melissa,

The case is TTMA v EPA, DC Circuit no. 16-1430. Massachusetts did not challenge the regulation but is a party to the litigation as an intervenor-respondent, so it would be good for me to know if that avoids recusal issues.

David Orlin

U.S. EPA, Office of General Counsel

(202) 564-1222

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**From:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>

**Sent:** Thursday, February 11, 2021 10:14 AM

**To:** Orlin, David <Orlin.David@epa.gov>

**Cc:** Fugh, Justina <Fugh.Justina@epa.gov>

**Subject:** Trailers

Hi David,

I want to double check on my recusal status for this one. Do you happen to have the docket and number and/or know if the Commonwealth of MA challenged? I do not recall, but don't think so. Thanks.

Melissa

**From:** [Fugh, Justina](#)  
**To:** [Hoffer, Melissa](#)  
**Cc:** [Payne, James \(Jim\)](#)  
**Subject:** RE: WOTUS Cases  
**Date:** Thursday, January 28, 2021 10:59:00 AM  
**Attachments:** [WOTUS and 401 Cases to which State of Mass is not a party.docx](#)

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Hi Melissa,

This note confirms for you that, for the purposes of the federal ethics rules, you may participate personally and substantially on behalf of EPA in the cases identified in the attached list with the exception of *Conservation Law Found. V. EPA*, No. 20-10820 (D. Mass.) in which MA filed an *amicus* brief, pending clarification of any prior participation by you. See step 3 of the draft process below. Your former employer/client is not a party to any of them so you did not work personally and substantially on those specific party matters.

I looked up the [Massachusetts bar rule 1.11](#) that applies special conflicts of interest rules for former and current government officers and employees. Unlike the ABA model rules and the DC Bar rule, Massachusetts focuses on the same specific party matter that the former government official participated in personally and substantially. It does not use the vexing phrase “same or *substantially related* specific party matter.” Therefore, I don’t see that you will have a bar restriction either. You may participate in the cases on the attached list fully.

I created a process flowchart for the Associates to follow that Jim is currently reviewing. But Steve Neugeboren needed some advice this week, so I sent him the process already, which is this:

1. Review the list of cases from which Melissa and Dimple are recused
  - a. If the case is on their list, then do not discuss with that principal
  - b. If the case is not on their list, proceed to step 2.
2. Look to see if their former employer (Melissa = Massachusetts, Dimple = NRDC) is a party or intervenor
  - a. If yes, then do not discuss with that principal
- i. Please note that, for Melissa, OGC/Ethics will soon issue an impartiality determination to permit her to work on NEW specific party matters with Massachusetts but we haven’t yet done so.
  - b. If no, then you may discuss with that principal.
3. If the former employer files an *amicus* brief, then
  - a. Ascertain whether Melissa or Dimple worked on that brief.
- i. If yes, then do not discuss
- ii. If not, then:
  1. Do not discuss that brief with Melissa until after January 20, 2022 (unless OGC/Ethics advises otherwise)
  2. Do not discuss that brief with Dimple until after January 20, 2023

I am currently reviewing a draft of the impartiality determination to allow you to work on *new* specific party matters involving Massachusetts. And I’m going to ask some talented people on my team to create a cool pictorial flow chart to capture the process laid out narratively above. Hope this helps,

Justina

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**From:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>

**Sent:** Thursday, January 28, 2021 10:30 AM

**To:** Fugh, Justina <Fugh.Justina@epa.gov>

**Cc:** Payne, James (Jim) <payne.james@epa.gov>

**Subject:** WOTUS Cases

**Importance:** High

Hi Justina,

As you know, the Commonwealth of Massachusetts is a party to several cases challenging the WOTUS rule. I understand from Steve N that you have advised that, with respect to the pending litigation concerning WOTUS that the Commonwealth of Massachusetts is **\*not\*** a party to, I am permitted to participate in litigation strategy decisions. Before I do that, I wanted to confirm that accurately reflects your advice, and request that you provide a confirmatory email before I proceed.

Thank you,

Melissa



## Challenges to Waters of the United States and Section 401 Rules to which Massachusetts is not a Party

### WOTUS Cases

- ***Am. Exploration & Mining Ass'n v. EPA***, No. 16-01279 (D.D.C.) (challenge to 2015 Clean Water Rule)
- ***Chesapeake Bay Found. v. Wheeler***, Nos. 20-01063 & 20-01064 (D. Md.) (consolidated cases challenging Navigable Waters Protection Rule & 2019 Repeal Rule)
- ***Colorado v. EPA***, No. 20-01461 (D. Colo.) (challenge to Navigable Waters Protection Rule)<sup>1</sup>
- ***Conservation Law Found. v. EPA***, No. 20-10820 (D. Mass.) (challenge to Navigable Waters Protection Rule) **note that Mass. filed amicus brief**
- ***Env'tl. Integrity Project v. Wheeler***, No. 20-01734 (D.D.C.) (challenge to Navigable Waters Protection Rule)
- ***Murray v. Wheeler***, No. 19-01498 (N.D.N.Y.) (challenge to Navigable Waters Protection Rule & 2019 Repeal Rule)
- ***Navajo Nation v. Wheeler***, No. 20-00602 (D.N.M.) (challenge to Navigable Waters Protection Rule & 2019 Repeal Rule)
- ***N.M. Cattle Growers' Ass'n v. EPA***, No. 19-00988 (D.N.M.) (challenge to Navigable Waters Protection Rule & 2019 Repeal Rule)
- ***North Dakota v. EPA***, No. 15-00059 (D.N.D.) (challenge to 2015 Clean Water Rule)
- ***Ohio v. Corps***, No. 15-02467 (S.D. Ohio) (challenge to 2015 Clean Water Rule)
- ***Or. Cattlemen's Ass'n v. EPA***, No. 19-00564 (D. Or.) (challenge to Navigable Waters Protection Rule & 2015 Clean Water Rule)
- ***Pascua Yaqui Tribe v. EPA***, No. 20-00266 (D. Ariz.) (challenge to Navigable Waters Protection Rule & 2019 Repeal Rule)
- ***Pierce v. EPA***, No. 19-02193 (D. Minn.) (challenge to 2019 Repeal Rule & 2015 Clean Water Rule)
- ***Puget Soundkeeper Alliance v. EPA***, No. 20-00950 (W.D. Wash.) (challenge to Navigable Waters Protection Rule & 2019 Repeal Rule)
- ***S.C. Coastal Conservation League v. Wheeler***, No. 19-03006 (D.S.C.) (challenge to 2019 Repeal Rule)
- ***S.C. Coastal Conservation League v. Wheeler***, No. 20-01687 (D.S.C.) (challenge to Navigable Waters Protection Rule)
- ***Southeast Stormwater Ass'n v. EPA***, No. 15-00579 (N.D. Fla.) (challenge to 2015 Clean Water Rule)
- ***Southeastern Legal Found. v. EPA***, No. 15-02488 (N.D. Ga.) (challenge to 2015 Clean Water Rule)
- ***Texas v. EPA***, No. 15-00162 (S.D. Tex.) (challenge to 2015 Clean Water Rule)
- ***Wash. Cattlemen's Ass'n v. EPA***, No. 19-00569 (W.D. Wash.) (challenge to Navigable Waters Protection Rule, 2019 Repeal Rule, and 2015 Clean Water Rule)
- ***Waterkeeper Alliance v. EPA***, No. 18-03521 (N.D. Cal.) (challenge to Navigable Waters Protection Rule, 2019 Repeal Rule, and 2015 Clean Water Rule)

### 401 Cases

- ***Delaware Riverkeeper v. EPA***, No. 2:20-CV-3412 (E.D. Pa)
- ***South Carolina Coastal Conservation League, et al. v. EPA***, No. 2:20-cv-03062-DCN (D. S.C.)

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<sup>1</sup> *Colorado v. EPA*, No. 20-1238 (10th Cir.) (consolidated appeal of D. Colo. order granting motion for preliminary injunction against the NWPR in the state of Colorado; oral argument was held on November 18, 2020).

**From:** [Hoffer, Melissa](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Payne, James \(Jim\)](#)  
**Subject:** RE: WOTUS Cases  
**Date:** Thursday, January 28, 2021 12:28:29 PM

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This is very helpful and timely. Thank you.  
Melissa

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**From:** Fugh, Justina <Fugh.Justina@epa.gov>  
**Sent:** Thursday, January 28, 2021 11:00 AM  
**To:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>  
**Cc:** Payne, James (Jim) <payne.james@epa.gov>  
**Subject:** RE: WOTUS Cases

Hi Melissa,

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I looked up the [Massachusetts bar rule 1.11](#) that applies special conflicts of interest rules for former and current government officers and employees. Unlike the ABA model rules and the DC Bar rule, Massachusetts focuses on the same specific party matter that the former government official participated in personally and substantially. It does not use the vexing phrase “same or *substantially related* specific party matter.” Therefore, I don’t see that you will have a bar restriction either. You may participate in the cases on the attached list fully.

I created a process flowchart for the Associates to follow that Jim is currently reviewing. But Steve Neugeboren needed some advice this week, so I sent him the process already, which is this:

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  2. Look to see if their former employer (Melissa = Massachusetts, Dimple = NRDC) is a party or intervenor
    - a. If yes, then do not discuss with that principal
- i. Please note that, for Melissa, OGC/Ethics will soon issue an impartiality determination to permit her to work on NEW specific party matters with Massachusetts but we haven’t yet done so.
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helps,

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**From:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>

**Sent:** Thursday, January 28, 2021 10:30 AM

**To:** Fugh, Justina <Fugh.Justina@epa.gov>

**Cc:** Payne, James (Jim) <payne.james@epa.gov>

**Subject:** WOTUS Cases

**Importance:** High

Hi Justina,

As you know, the Commonwealth of Massachusetts is a party to several cases challenging the WOTUS rule. I understand from Steve N that you have advised that, with respect to the pending litigation concerning WOTUS that the Commonwealth of Massachusetts is **\*not\*** a party to, I am permitted to participate in litigation strategy decisions. Before I do that, I wanted to confirm that accurately reflects your advice, and request that you provide a confirmatory email before I proceed.

Thank you,

Melissa

**From:** [Hoffer, Melissa](#)  
**To:** [Neugeboren, Steven](#)  
**Cc:** [Payne, James \(Jim\)](#); [Chaudhary, Dimple](#); [Fugh, Justina](#)  
**Subject:** FW: WOTUS Cases  
**Date:** Thursday, January 28, 2021 12:29:26 PM  
**Attachments:** [WOTUS and 401 Cases to which State of Mass is not a party.docx](#)

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Steve—all set and for your records.

Melissa

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**From:** Fugh, Justina <Fugh.Justina@epa.gov>  
**Sent:** Thursday, January 28, 2021 11:00 AM  
**To:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>  
**Cc:** Payne, James (Jim) <payne.james@epa.gov>  
**Subject:** RE: WOTUS Cases

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2. Look to see if their former employer (Melissa = Massachusetts, Dimple = NRDC) is a party or intervenor
  - a. If yes, then do not discuss with that principal
- i. Please note that, for Melissa, OGC/Ethics will soon issue an impartiality determination to permit her to work on NEW specific party matters with Massachusetts but we haven’t yet done so.
  - b. If no, then you may discuss with that principal.
3. If the former employer files an *amicus* brief, then
  - a. Ascertain whether Melissa or Dimple worked on that brief.
- i. If yes, then do not discuss
- ii. If not, then:
  1. Do not discuss that brief with Melissa until after January 20, 2022 (unless OGC/Ethics advises otherwise)
  2. Do not discuss that brief with Dimple until after January 20, 2023

I am currently reviewing a draft of the impartiality determination to allow you to work on *new* specific party matters involving Massachusetts. And I’m going to ask some talented people on my team to create a cool pictorial flow chart to capture the process laid out narratively above. Hope this

helps,

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>

**Sent:** Thursday, January 28, 2021 10:30 AM

**To:** Fugh, Justina <Fugh.Justina@epa.gov>

**Cc:** Payne, James (Jim) <payne.james@epa.gov>

**Subject:** WOTUS Cases

**Importance:** High

Hi Justina,

As you know, the Commonwealth of Massachusetts is a party to several cases challenging the WOTUS rule. I understand from Steve N that you have advised that, with respect to the pending litigation concerning WOTUS that the Commonwealth of Massachusetts is **\*not\*** a party to, I am permitted to participate in litigation strategy decisions. Before I do that, I wanted to confirm that accurately reflects your advice, and request that you provide a confirmatory email before I proceed.

Thank you,

Melissa

**From:** [Fugh, Justina](#)  
**To:** [Arroyo, Victoria](#); [Carbonell, Tomas](#); [Cassady, Alison](#); [Chaudhary, Dimple](#); [Fine, Philip](#); [Harris, Sincere](#); [Hoffer, Melissa](#); [Katims, Casey](#); [Lucey, John](#); [Utech, Dan](#)  
**Subject:** Welcome (really) to the wonderful world of public financial disclosure reporting!  
**Date:** Monday, January 25, 2021 12:58:00 AM  
**Attachments:** [Advisory - 278 and 278T reporting obligations January 2021 digitally signed.pdf](#)  
[reporting periods for 278s.docx](#)  
[When to Report Transactions on the OGE 278 and Part 7 - November 2020.docx](#)

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Hi there,

In your position you are required by the Ethics in Government Act of 1978 to file the Public Financial Disclosure Report. Using your EPA email address, I have now assigned you a new entrant report that we'll review. Having this information will allow us to assess your conflicts issues and then to draft recusal statements for those of you who need them. Don't worry ... we're here to help you.

#### DEADLINE FOR SUBMITTING THE REPORT

Technically, your "new entrant" report is due no later than 30 days from your start date at EPA or 2/19/21. If you need additional time, you must contact [ethics@epa.gov](mailto:ethics@epa.gov) before your deadline expires. There is a limit to how much additional time we can give you, and we can't grant any extension after the fact.

#### THE FINANCIAL DISCLOSURE REPORT, OGE-278e

EPA uses an electronic filing system ([www.INTEGRITY.gov](http://www.INTEGRITY.gov)) for the public financial disclosure reports that is operated and secured by the U.S. Office of Government Ethics (OGE). You are required by law to complete the form, and we will use it to determine whether you have any financial conflicts of interest or other ethics concerns. We have pre-populated the address field with EPA's address because, well, this is a public form and we don't want anyone to know your personal address. For help in INTEGRITY, check out the OGE [Public Financial Disclosure Guide](#). The email from INTEGRITY.gov will provide you with specific instructions to log into the federal government's max.gov site, the gateway to INTEGRITY. If you didn't receive your account notification, then check your clutter box for messages from INTEGRITY.gov, or contact [ethics@epa.gov](mailto:ethics@epa.gov).

There are several important things to know about the OGE-278e: (1) it is a public form (which means that anyone can ask for a copy of your form, but Congress repealed the requirement for public posting to the internet); (2) you have to fill it out every year you are in this position; (3) when you leave the position, you will have to file a termination report; and (4) you will be subject to a late filing fee of \$200 for not filing your report timely.

#### REQUIREMENT TO ANSWER ANY FOLLOW UP QUESTIONS WITHIN 14 DAYS

We will review your report as quickly as possible. If we have any questions, then we will notify you. At that point, you will have 14 calendar days to respond and resubmit your report back to us with any necessary changes.

#### REPORTING TRANSACTIONS

While you are in this position, you are a public financial disclosure filer who is subject to certain additional requirements of the Ethics In Government Act as amended by the STOCK Act. You will be required to report any purchase, sale or exchange of stocks, bonds, commodities futures or other forms of securities when the amount of the transaction exceeds \$1000. Use INTEGRITY to disclose reportable transactions within 30 days of receiving notification of the transaction, but not later than 45 days after the transaction occurs. You will have to report transactions that occur within brokerage accounts, managed accounts, or other investment vehicles that you own or jointly own with your spouse or another person, as well as transactions of your spouse or dependent children. We will go

over this requirement during your initial ethics training, but I've also attached our reminder about late fees and when to report transactions. Remember, you are responsible for reporting transactions, even if you have a managed account, and you will be fined for a tardy periodic transaction report.

YES, YOU CAN BE FINED FOR NOT FILING PROMPTLY

It's worth repeating that you can be fined \$200 for not meeting the submission deadline (and you still have to file that report). PLEASE pay attention to your filing requirements! If you need an extension, then you must ask before your deadline expires. There is a limit to how much additional time you may receive.

#### HELPFUL HINTS FOR FILLING OUT THE FORM

- This is a wretched and exacting form, so just know that you will have to provide a lot of information.
- You will get three different places to report assets: filer's employment-related assets and income, spouse's employment related assets and income, and other assets and income. You must report assets for yourself, your spouse and any dependent children. We don't really care where you report your assets, just that you do report them all someplace.
- You must include any investment asset that is worth more than \$1000. Include any income from any source that exceeded \$200 during the reporting period (including outside jobs or hobbies, rental income). Include any cash/savings accounts that have more than \$5000.
- Enter each asset separately. Don't lump items together on one line. Be sure to provide the valuation of the asset AND the amount of the income. For assets that aren't mutual funds, you also have to report the type of income (e.g., dividends, cap gains).
- For 401(k) or IRA plans, provide the name of each of the underlying assets. Don't just write "Vanguard IRA" or "mutual fund." You must specify each asset separately and give the valuation but, for these assets in tax deferred instruments, you do not need to provide the amount of income accrued.
- Do not report your federal salary, your spouse's federal salary, or Thrift Savings Plan information
- If you (not your spouse) have any earned income (e.g., outside job, paid pension), you have to report the actual amount of that income.
- If your spouse works outside of federal service, then include your spouse's employer but not the amount of your spouse's salary. If you are not legally married, do not report your significant other's employer.
- Don't forget to include any life insurance policies (whole life or variable life) as well as the underlying investments. Do not report term life insurance.
- If you have nothing to report in a section, be sure to click the "nothing to report" button
- The various parts of the form have different reporting periods, so please consult the attached "reporting periods" chart. Remember to check out the Office of Government Ethics' [Public Financial Disclosure Guide](#) or to contact OGC/Ethics for help.

If you have any questions regarding this message or your obligations, then please contact me or anyone in the OGC Ethics Office at [ethics@epa.gov](mailto:ethics@epa.gov). Good luck with the form and remember, we can answer any questions you may have.

Cheers,  
Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772



**From:** [Fugh, Justina](#)  
**To:** (b) (6)  
**Subject:** Welcome to the world of public financial disclosure reporting!  
**Date:** Thursday, January 14, 2021 12:57:00 AM  
**Attachments:** [Advisory to all 278 filers about filing fee.pdf](#)  
[reporting periods for 278s.docx](#)  
[When to Report Transactions on the OGE 278 and Part 7 - November 2020.docx](#)  
[Hatch Act chart Sept 2020.docx](#)

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Hi there,

And now it's time for the long message about financial disclosure. You can get started on the public financial disclosure report since you will be joining EPA on or about 1/20/21 as a non-career SES appointee in the position of Principal Deputy General Counsel. You will not be able to submit it until after you actually start, but we will still be able to peek at your progress. Given this type of appointment, you are required by the Ethics in Government Act of 1978 to file the Public Financial Disclosure Report. What follows is a long, chatty email with tons of information. If you need help, then please let me or my staff know. We really are here to help you.

#### DEADLINE FOR SUBMITTING THE REPORT

Technically, your "new entrant" report is due no later than 30 days from your effective date at EPA or 2/19/21. If you need additional time, you must contact [ethics@epa.gov](mailto:ethics@epa.gov) before your deadline expires. There is a limit to how much additional time we can give you, and we can't grant any extension after the fact.

#### THE FINANCIAL DISCLOSURE REPORT, OGE-278e

EPA uses an electronic filing system ([www.INTEGRITY.gov](http://www.INTEGRITY.gov)) for the public financial disclosure reports that is operated and secured by the U.S. Office of Government Ethics (OGE). You are required by law to complete the form, and we will use it to determine whether you have any financial conflicts of interest or other ethics concerns.

We created an account for you in INTEGRITY and have assigned you a "new entrant" report. Your filer category is "non career SES" and your filer status is "full time." We have pre-populated the address field with EPA's address because, well, this is a public form and we don't want anyone to know your personal address. For help in INTEGRITY, check out the OGE [Public Financial Disclosure Guide](#). The email from INTEGRITY.gov will provide you with specific instructions to log into the federal government's max.gov site, the gateway to INTEGRITY. If you didn't receive your account notification, then check your clutter box for messages from INTEGRITY.gov, or contact [ethics@epa.gov](mailto:ethics@epa.gov).

There are several important things to know about the OGE-278e: (1) it is a public form (which means that anyone can ask for a copy of your form, but Congress repealed the requirement for public posting to the internet); (2) you have to fill it out every year you are in this position; (3) when you leave the position, you will have to file a termination report; and (4) you will be subject to a late filing fee of \$200 for not filing your report timely.

#### REQUIREMENT TO ANSWER ANY FOLLOW UP QUESTIONS WITHIN 14 DAYS

We will review your report as quickly as possible. If we have any questions, then we will notify

you. At that point, you will have 14 calendar days to respond and resubmit your report back to us with any necessary changes.

## REPORTING TRANSACTIONS

While you are in this position, you are a public financial disclosure filer who is subject to certain additional requirements of the Ethics In Government Act as amended by the STOCK Act. You will be required to report any purchase, sale or exchange of stocks, bonds, commodities futures or other forms of securities when the amount of the transaction exceeds \$1000. Use INTEGRITY to disclose reportable transactions within 30 days of receiving notification of the transaction, but not later than 45 days after the transaction occurs. You will have to report transactions that occur within brokerage accounts, managed accounts, or other investment vehicles that you own or jointly own with your spouse or another person, as well as transactions of your spouse or dependent children. We will go over this requirement during your initial ethics training, but I've also attached our reminder about late fees and when to report transactions. Remember, you are responsible for reporting transactions, even if you have a managed account, and you will be fined for a tardy periodic transaction report.

YES, YOU CAN BE FINED FOR NOT FILING PROMPTLY

It's worth repeating that you can be fined \$200 for not meeting the submission deadline (and you still have to file that report). PLEASE pay attention to your filing requirements! If you need an extension, then you must ask before your deadline expires. There is a limit to how much additional time you may receive.

## HELPFUL HINTS FOR FILLING OUT THE FORM

- This is a wretched and exacting form, so just know that you will have to provide a lot of information.
- You will get three different places to report assets: filer's employment-related assets and income, spouse's employment related assets and income, and other assets and income. You must report assets for yourself, your spouse and any dependent children. We don't really care where you report your assets, just that you do report them all someplace.
- You must include any investment asset that is worth more than \$1000. Include any income from any source that exceeded \$200 during the reporting period (including outside jobs or hobbies, rental income). Include any cash/savings accounts that have more than \$5000.
- Enter each asset separately. Don't lump items together on one line. Be sure to provide the valuation of the asset AND the amount of the income. For assets that aren't mutual funds, you also have to report the type of income (e.g., dividends, cap gains).
- For 401(k) or IRA plans, provide the name of each of the underlying assets. Don't just

write "Vanguard IRA" or "mutual fund." You must specify each asset separately and give the valuation but, for these assets in tax deferred instruments, you do not need to provide the amount of income accrued.

- Do not report your federal salary, your spouse's federal salary, or Thrift Savings Plan information
- If you (not your spouse) have any earned income (e.g., outside job, paid pension), you have to report the actual amount of that income.
- If your spouse works outside of federal service, then include your spouse's employer but not the amount of your spouse's salary. If you are not legally married, do not report your significant other's employer.
- Don't forget to include any life insurance policies (whole life or variable life) as well as the underlying investments. Do not report term life insurance.
- If you have nothing to report in a section, be sure to click the "nothing to report" button
- The various parts of the form have different reporting periods, so please consult the attached "reporting periods" chart. Remember to check out the Office of Government Ethics' [Public Financial Disclosure Guide](#) or to contact OGC/Ethics for help. We know this is a beast of a form, so we really are here to help you.

## OTHER ETHICS REQUIREMENTS FOR YOU

### HATCH ACT

As a federal employee, you will be "lesser restricted" under the Hatch Act. During your new employee orientation, the ethics staff will go over the Hatch Act, which governs the political activity of government employees. For a refresher, you can familiarize yourself with the Hatch Act as it affects you by reviewing our attached handy chart.

### ETHICS TRAINING

As a public financial disclosure filer, you must take one hour of ethics training this year. The new employee training you will have with the ethics staff meets your annual training requirement for this year. Next year, you will take the annual training online.

If you have any questions regarding this message or your obligations, then please contact me or anyone in the OGC Ethics Office at [ethics@epa.gov](mailto:ethics@epa.gov). We'll be happy to assist you.

Cheers,

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Washington, D.C. 20460

January 22, 2021

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

SUBJECT: Timely filing of Public Financial Disclosure and Periodic Transaction Reports

FROM: Justina Fugh **Justina Fugh** Digitally signed by Justina Fugh  
Date: 2021.01.22 12:07:49  
-05'00'  
Alternate Designated Agency Ethics Official

TO: All EPA Political Appointees

In 1978, Congress enacted the Ethics In Government Act, 5 U.S.C. app. to establish the Executive Branch financial disclosure reporting system that requires mandatory public disclosure of financial and employment information of certain officials and their immediate families. Because you occupy a designated position, you are required by this law to file these reports in the electronic system, *INTEGRITY*. As an executive branch employee, you are bound by federal ethics laws and regulations, including prohibitions against financial conflicts of interest and loss of impartiality. Your disclosures allow the Office of General Counsel's Ethics Office (OGC/Ethics) to assist you in identifying and addressing potential or actual conflicts of interest in order to maintain the integrity of the Agency's programs and operations. These reports are publicly available upon request and the reports of certain Presidential Appointees confirmed by the Senate will be posted on the U.S. Office of Government Ethics' website at [www.oge.gov](http://www.oge.gov).

This memorandum formally informs you that you are required by law to file timely and accurate Public Financial Disclosure Reports (OGE 278e)<sup>1</sup> and Periodic Transaction Reports (OGE 278-Ts).<sup>2</sup> **Filing a late report will result in a \$200 late filing fee** unless you formally request and receive a waiver of the late fee from me or the Designated Agency Ethics Official (DAEO), Jim Payne, after describing extraordinary circumstances that caused you to file a late report.<sup>3</sup> **Unpaid late fees are subject to the Agency's<sup>4</sup> and the government's debt collection procedures and will be referred for collection if left unpaid after 30 days.**

Please refer to this chart for your filing obligations:

<sup>1</sup> See 5 U.S.C. app. § 101; 5 C.F.R. § 2634.201.

<sup>2</sup> Pub. L. 112-105 § 11 (STOCK Act).

<sup>3</sup> See 5 U.S.C. app. § 104(d)(1); 5 C.F.R. § 2634.704(a).

<sup>4</sup> See Resource Management Directive System 2540-03-P2 dated 07/12/2016.

OGE 278e - New Entrant reports	<b>Within 30 days</b> of entering a covered position (either by appointment to a permanent or acting in covered position)
OGE 278e – Incumbent reports	<b>No later than May 15</b>
OGE 278e – Termination reports	<b>No later than 30 days after</b> leaving a covered position (either through reassignment, resignation, or the end of acting in a covered position) (Reports may be submitted within 15 days prior to termination)
OGE 278T – Periodic transaction reports <sup>5</sup>	<b>The <i>earlier of</i> 30 days</b> after learning of a transaction or <b>45 days</b> of the transaction taking place.

How to request an extension of the filing deadline:

For good cause (e.g., travel, workload issues, sickness), you may request up to two 45-day extensions. Submit the request by email, including the reason, to [ethics@epa.gov](mailto:ethics@epa.gov) **prior to the due date**. Extensions cannot be granted after the due date has passed.

How to request the waiver of a late filing fee:

If *extraordinary circumstances* prevented you from meeting the deadline and OGC/Ethics assessed a late fee, you may request a waiver of the late fee. *See* 5 C.F.R. § 2634.704. Submit your request in writing to [ethics@epa.gov](mailto:ethics@epa.gov) describing the extraordinary circumstances and provide any supporting documentation. Please note that vacations or routine work obligations are not “extraordinary” circumstances. The decision to grant or deny a waiver is at the sole discretion of the DAEO/ADAEO and is final.

Your colleagues in OGC/Ethics are available to provide assistance but it is always your obligation to file your reports timely and accurately. In fact, ethics regulations *require* that we refer individuals to the Department of Justice (DOJ) when there is reasonable cause to believe that they have willfully failed to file a required report or provide the information that the report requires. The current maximum civil penalty is \$56,216.<sup>6</sup>

As public servants, we hope that you will take your ethics obligations seriously. As such, we expect you to make a good faith effort to adhere to the timeliness and completeness requirements of your financial disclosure reporting obligations. If you have any questions, please contact [ethics@epa.gov](mailto:ethics@epa.gov).

ATTACHMENT - *When to Report Transactions on the OGE 278 and OGE 278-T*

<sup>5</sup> See attached guidance – *When to Report Transactions on the OGE 278 and OGE 278-T*.

<sup>6</sup> In 2012, OGC/Ethics referred an individual to DOJ for failure to file a termination report despite repeated reminders and entreaties. That individual paid a civil penalty of \$15,000 and still had to file the termination report.



# When to Report Transactions

FILING DEADLINE : 30 days from notification or 45 days from transaction *whichever is earlier*

**A \$200 late filing fee penalty is assessed for each late periodic reporting period<sup>1</sup>**

	Periodic Transaction Report	Annual and/or Termination Report
Investment Assets	Report on the OGE 278-T?	Report on Part 7 of the OGE 278e?
Transactions of \$1,000 or less		
• Any asset in which the transaction amount is \$1,000 or less regardless of the type of asset or who owns the asset	No	No
Investment assets held by you, your spouse, or jointly held		
• Stocks or stock options	Yes	Yes
• Corporate or municipal bonds (exclude U.S. Treasury securities)	Yes	Yes
• Commodity futures	Yes	Yes
• Other investment securities	Yes	Yes
• Assets listed above in your individual, joint, or spousal brokerage accounts managed accounts, IRAs, other retirement accounts, and/or other investment vehicles	Yes	Yes
Your dependent child's investment assets		
• Stocks	Yes	Yes
• Corporate or municipal bonds (exclude U.S. Treasury securities)	Yes	Yes
• commodity futures	Yes	Yes
• other investment securities	Yes	Yes
• Assets listed above in dependent child's <u>own</u> or UGMA brokerage account, IRAs, and/or other investment vehicles	Yes	Yes
Other investment assets irrespective of ownership		
• Real Property	No	Yes <sup>2</sup>
• Mutual funds, exchange traded funds, 529 plans, index funds, and/or other "excepted investment funds" <sup>3</sup>	No	Yes
• Any asset in which the transaction amount is \$1,000 or less	No	No
• Cash accounts (deposits and/or withdrawals) or certificates of deposit	No	No
• Money market accounts and mutual funds	No	No
• US Treasury securities (e.g., T bills, Treasury bonds, savings bonds)	No	No
• Federal government retirement accounts (e.g., Thrift Savings Plan)	No	No
• Life insurance and annuities	No	No
• Collectibles	No	No
• Assets held within an excepted trust <sup>4</sup>	No	No
• Transfer of assets between you, your spouse, and your dependent children	No	No

Last updated November 2020

<sup>1</sup> This late fee is automatically imposed by law and is non-negotiable. You may request a waiver of any late filing fee from the Designated Agency Ethics Official or the Alternate DAEO if there are extraordinary circumstances. A fee waiver is at the sole discretion of the DAEO/ADAEO and is not subject to appeal. A filer who has unpaid late fees will be referred to the appropriate federal office or agency for debt collection procedures.

<sup>2</sup> Do not report the purchase or sale of your personal residence on Part 7 unless you rent it out at any time during the reporting period.

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<sup>3</sup> To be an excepted investment fund (EIF), the asset must be:

- (a) widely held (more than 100 participants),
- (b) independently managed – arranged so that you neither exercise control nor have the ability to exercise control over the financial interests held by the fund, and
- (c) publicly traded (or available) or widely diversified.

Managed accounts, investment clubs, trusts, 529 accounts, brokerage accounts, and individual retirement accounts (IRAs) are not excepted investment funds in and of themselves. It may be that individual assets held within these types of investment vehicles may qualify as EIFs if, for example, your IRA holds a publicly-traded mutual fund. But the fact that you have a managed account does not absolve you of your reporting requirements. That account is legally owned by you, and you're responsible for its assets and reporting transactions. If you have questions, contact [ethics@epa.gov](mailto:ethics@epa.gov).

<sup>4</sup> OGC/Ethics must determine that your trust qualifies as an “excepted trust.” For help, email [ethics@epa.gov](mailto:ethics@epa.gov).

The reporting periods for the OGE Form 278e vary depending on the type of report being filed.

Part	Report Information for the Following Period...			
	Nominee, New Entrant, and Candidate	Annual	Termination	Annual / Termination
1. Filer's Positions Held Outside United States Government	Preceding Two Calendar Years to Filing Date	Preceding Calendar Year to Filing Date	Current Calendar Year to Term Date (in addition, the preceding calendar year if an Annual report for that year is required but has not yet been filed)	Preceding Calendar Year to Term Date
2. Filer's Employment Assets & Income and Retirement Accounts	Preceding Calendar Year to Filing Date <sup>1</sup>	Preceding Calendar Year	Same as Part 1	Same as Part 1
3. Filer's Employment Agreements and Arrangements	As of Filing Date	Preceding Calendar Year to Filing Date	Same as Part 1	Same as Part 1
4. Filer's Sources of Compensation Exceeding \$5,000 in a Year	Preceding Two Calendar Years to Filing Date (n/a for Candidates)	N/A – Leave this Part blank	N/A – Leave this Part blank	N/A – Leave this Part blank
5. Spouse's Employment Assets & Income and Retirement Accounts	Preceding Calendar Year to Filing Date <sup>1</sup>	Preceding Calendar Year	Same as Part 1	Same as Part 1
6. Other Assets and Income	Preceding Calendar Year to Filing Date <sup>1</sup>	Preceding Calendar Year	Same as Part 1	Same as Part 1
7. Transactions	N/A – Leave this Part blank	Preceding Calendar Year <sup>2</sup>	Same as Part 1 <sup>2</sup>	Same as Part 1 <sup>2</sup>
8. Liabilities	Preceding Calendar Year to Filing Date <sup>1</sup>	Preceding Calendar Year	Same as Part 1	Same as Part 1
9. Gifts and Travel Reimbursements	N/A – Leave this Part blank	Preceding Calendar Year <sup>3</sup>	Same as Part 1 <sup>3</sup>	Same as Part 1 <sup>3</sup>

1. For example, if today is March 3, 2019, the reporting period would run from January 1, 2018, to March 3, 2019. When valuing assets and liabilities, the filer may choose any date that is fewer than 31 days before the filing date.

2. Filers do not need to include any period when they were not a public financial disclosure filer or an employee of the United States Government.

3. Filers do not need to include any period when they were not an employee of the United States Government.

#### Extensions Do Not Change the Reporting Period

The reporting period is tied to a report's original due date and is unaffected by any extensions. For example, a New Entrant report was originally due December 14, 2019. The filer received a 30-day extension and filed January 8, 2020. The Part 2 reporting period would start on January 1, 2018, and end on December 14, 2019.





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

SUBJECT: Timely Filing of Public Financial Disclosure and Periodic Transaction Reports

FROM: David Cozad *David Cozad* 8/29/19  
Acting Designated Agency Ethics Official

TO: All EPA Public Financial Disclosure Report Filers

In 1978, Congress enacted the Ethics In Government Act, 5 U.S.C. app., to establish the Executive Branch financial disclosure reporting system that requires mandatory public disclosure of financial and employment information of certain officials and their immediate families. Because you occupy a designated position (either permanently or for more than 60 days on detail), you are required by this statute to file the public financial disclosure report. As executive branch employees, we are all bound by federal ethics laws and regulations, including prohibitions against financial conflicts of interest and loss of impartiality. Your disclosures allow the Office of General Counsel's Ethics Office (OGC/Ethics) to assist you in identifying and addressing potential or actual conflicts of interest in order to maintain the integrity of the Agency's programs and operations.

This memorandum formally reminds you that you are required by law to timely and accurately file your Public Financial Disclosure Reports (OGE 278e)<sup>1</sup> and Periodic Transaction Reports (OGE 278-Ts).<sup>2</sup> Failure to file timely will result in a **\$200 late filing fee** unless you formally request and receive a waiver of the late fee from the Designated Agency Ethics Official (DAEO) or Alternate Designated Agency Ethics Official (ADAEO).<sup>3</sup> Unpaid late fees are subject to the Agency's<sup>4</sup> and the government's debt collection procedures.

In addition to filing timely, you must also file a complete and accurate report. Should OGC/Ethics contact you for any additional required information, you will have no more than **30 days** to update your report. For guidance on how to file an accurate report, please refer to the Public Financial Disclosure Guide or contact OGC/Ethics at [ethics@epa.gov](mailto:ethics@epa.gov).

<sup>1</sup> See 5 U.S.C. app. § 101; 5 C.F.R. § 2634.201.

<sup>2</sup> Pub. L. 112-105 § 11 (STOCK Act).

<sup>3</sup> See 5 U.S.C. app. § 104(d)(1); 5 C.F.R. § 2634.704(a).

<sup>4</sup> See Resource Management Directive System 2540-03-P2 dated 07/12/2016.

Please refer to this chart for your filing obligations:

OGE 278e - New Entrant reports	<b>Within 30 days</b> of entering a covered position (either by appointment to a permanent or acting in covered position)
OGE 278e – Incumbent reports	<b>No later than May 15</b>
OGE 278e – Termination reports	<b>No later than 30 days after</b> leaving a covered position (either through reassignment, resignation, or the end of acting in a covered position) (Reports may be submitted within 15 days prior to termination)
OGE 278T – Periodic transaction reports <sup>5</sup>	<b>The earlier of 30 days</b> after learning of a transaction or <b>45 days</b> of the transaction taking place.

How to request an extension of the filing deadline:

For good cause (e.g., travel, workload issues, sickness), you may request up to two 45-day extensions. Submit the request by email, including the reason, to [ethics@epa.gov](mailto:ethics@epa.gov) **prior to the due date**. Extensions cannot be granted after the due date has passed.

How to request the waiver of a late filing fee:

If *extraordinary circumstances* prevented you from meeting the deadline and OGC/Ethics assessed a late fee, you may request a waiver of the late fee. See 5 C.F.R. § 2634.704. Submit your request in writing to [ethics@epa.gov](mailto:ethics@epa.gov), to the attention of the DAEO and ADAEO, describing the extraordinary circumstances and provide any supporting documentation. Please note that vacations or routine work obligations are not “extraordinary” circumstances. The decision to grant or deny a waiver is at the sole discretion of the DAEO/ADAEO and is final.

You are required by law to comply with these financial reporting obligations. Your colleagues in OGC/Ethics are available to provide assistance, but it is always your obligation to file your reports timely and accurately. In fact, ethics regulations *require* that we refer individuals to the Department of Justice (DOJ) when there is reasonable cause to believe that they have willfully failed to file a required report or provide the information that the report requires. The current maximum civil penalty is \$56,216.<sup>6</sup>

As public servants, we know that you take your ethics obligations seriously. As such, we expect you to make a good faith effort to adhere to the timeliness and completeness requirements of your financial disclosure reporting obligations. If you have any questions, please contact [ethics@epa.gov](mailto:ethics@epa.gov).

ATTACHMENT - *When to Report Transactions on the OGE 278 and OGE 278T*

cc: Justina Fugh, Alternate Designated Agency Ethics Official

<sup>5</sup> See attached guidance – *When to Report Transactions on the OGE 278 and OGE 278T*.

<sup>6</sup> In 2012, OGC/Ethics referred an individual to DOJ for failure to file a termination report despite repeated reminders and entreaties. That individual paid a civil penalty of \$15,000 and still had to file the termination report.

## Political Activities and Federal Employees

The Hatch Act, enacted in 1939, was amended in 1993 and 2012. It regulates the political activities of executive branch employees, excluding the President and Vice President. The following table summarizes what political activities EPA employees can and cannot do based on their appointment. Note: Public Health Service officers must adhere to 45 CFR Part 73, Subpart F, which is most similar to the Career SES/ALJ column.

**Political activity means an activity “directed toward the success or failure of a political party, a candidate for partisan political office, or a partisan political group.”**

Type of Activity	PAS*	Non-Career SES, Schedule C*, Title 42, SL/ST, AD*, GS, Other	Career SES, ALJs
<b>Personal (off premises and off duty)</b>			
Express support for or opposition to a political candidate when off duty	Yes	Yes	Yes
Run as a partisan candidate for nomination or office in a partisan election	No	No	No
Solicit and accept contributions for your campaign in a non-partisan election	Yes	Yes	Yes
Solicit a contribution from a member of your union	N/A	Yes	N/A
Work a phone bank asking individuals to volunteer	Yes	Yes	No
Campaign on behalf of a candidate in a partisan election	Yes	Yes	No
Be active on behalf of a candidate at political rallies or meetings	Yes	Yes	No
Attend political rallies and meetings	Yes	Yes	Yes
Contribute money to political organizations	Yes	Yes	Yes
Work in non-partisan voter registration drives	Yes	Yes	Yes
Work in partisan voter registration drives	Yes	Yes	No
Register and vote	Yes	Yes	Yes
Sign a nominating petition	Yes	Yes	Yes
Distribute campaign material in a partisan election	Yes	Yes	No
Work as an election judge, poll watcher, clerical worker on election day and receive compensation for that work	Yes	Yes	Yes but nonpartisan only
Drive people to polling station on behalf of a campaign	Yes	Yes	No
<b>Affecting Official Resources</b>			
Use office time for political activity	Yes; IG-No	No	No
Use official space for political activity in general	Yes; IG-No	No	No
<b>Fundraising</b>			
Attend a political fundraiser	Yes	Yes	Yes
Solicit, accept or receive political contributions in general	No	No	No
Solicit or receive a political contribution on government premises	No	No	No
Plan or organize a political fundraiser when off duty	Yes	Yes	No
Sponsor, host, or allow your name as sponsor/host for a political fundraiser	No	No	No
Serve drinks or check coats at a political fundraiser	Yes	Yes	No
Speak at a partisan fundraiser without appealing for money	Yes	Yes	No
Allow only your name to be listed as speaker on fundraising invitation	Yes	Yes	No

\*PAS = Political Appointee Confirmed by the Senate; Schedule C = political appointees not confirmed by Senate; AD = Administratively Determined; SES = Senior Executive Service

**From:** [Fugh, Justina](#)  
**To:** [Harris, Sincere](#); [Utech, Dan](#); [Cassady, Alison](#); [Hoffer, Melissa](#); [Hamilton, Lindsay](#); [Chaudhary, Dimple](#); [Adhar, Radha](#); [Fox, Radhika](#); [Enobakhare, Rosemary](#); [Fine, Philip](#); [Katims, Casey](#); [Arroyo, Victoria](#); [Lucey, John](#); [Goffman, Joseph](#); [Carbonell, Tomas](#)  
**Cc:** [OGC Ethics](#); [Payne, James \(Jim\)](#)  
**Subject:** your ethics obligations ... briefing materials, references and the pledge  
**Date:** Friday, January 22, 2021 2:04:00 PM  
**Attachments:** [Biden Ethics Pledge for digital signature.pdf](#)  
[Ethics Briefing Packet for Political Appointees.pdf](#)

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Hi there,

Thank you all for attending your initial ethics briefing on Thursday, January 21, 2021. All of us in OGC/Ethics appreciate your attentiveness and interest. Attached is the briefing material we promised you that includes information about your transaction reporting obligations, the form to use for notification of negotiation for non-federal employment, a handy Hatch Act chart, and a one-pager on embedding ethics in your calendaring process. The packet also includes a pdf of the Biden Executive Order on "Ethic Commitments" for your reference. And I have attached separately the Biden Ethics Pledge for you to sign digitally and return to [ethics@epa.gov](mailto:ethics@epa.gov).

So what about your financial disclosure report? Well, I'm not ready for you to work on that if you haven't yet started. I need to set up new accounts for you using your EPA email addresses, then will send you a new email with instructions. I know that some of you already started your reports that were assigned to your personal email address, which is fine. That information is saved and will be transferred over to your new accounts under your EPA email addresses. Try to find something to occupy your time over the next day or so (ha!), and then you can spend a leisurely and frustrating time with the public financial disclosure report a bit later, once you get the email from me. Each of you will have a contact on the OGC/Ethics team to help you navigate your form and any ethics concerns you may have. Our contact information is included on the first page of your briefing material. We are all always just a call or an email away.

Happy Friday!

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

## Ethics Briefing

### 1. The Ethics Program at the Environmental Protection Agency

You have ethics officials in the Office of General Counsel who can assist you:

<b>Jim Payne</b> Designated Agency Ethics Official (202) 564-0212 <a href="mailto:payne.james@epa.gov">payne.james@epa.gov</a>	
<b>Justina Fugh</b> Alternate Agency Ethics Official and Director of Ethics Office (202) 564-1786 <a href="mailto:fugh.justina@epa.gov">fugh.justina@epa.gov</a>	
<b>Shannon Griffo</b> Ethics Attorney (202) 564-7061 <a href="mailto:griffo.shannon@epa.gov">griffo.shannon@epa.gov</a>	<b>Margaret Ross</b> Ethics Officer (202) 564-3221 <a href="mailto:ross.margaret@epa.gov">ross.margaret@epa.gov</a>
<b>Jennie Keith</b> Ethics Officer (202) 564-3412 <a href="mailto:keith.jennie@epa.gov">keith.jennie@epa.gov</a>	<b>Victoria Clarke</b> Ethics Attorney 202-564-1149 <a href="mailto:clarke.victoria@epa.gov">clarke.victoria@epa.gov</a>
<b>Ferne Mosley</b> Ethics Attorney (202) 564-8046 <a href="mailto:mosley.ferne@epa.gov">mosley.ferne@epa.gov</a>	<b>OGC/Ethics</b> All Staff and Helpline (202) 564-2200 <a href="mailto:ethics@epa.gov">ethics@epa.gov</a>

You can also visit the [OGC/Ethics SharePoint site](#) for more information.

### 2. The General Principles of Ethical Conduct

As public servants, we have a duty to ensure that every citizen has complete confidence in the integrity of the United States and that we are not putting personal or private interests ahead of the public trust. There are 14 principles that form your [basic obligation of public service](#) that we'll address in this briefing material.

### 3. The President's Executive Order (for political appointees only)

On January 20, 2021, President Biden issued an Executive Order that includes an ethics pledge you must sign as a condition of your appointment. You are agreeing to a broader "ethics in government" plan to restore and maintain public trust in government, so please review the preamble carefully. The significant points of the pledge itself are described below:

*If you were a federally registered lobbyist or registered foreign agent in the past 2 years:*

- For the next 2 years, do not participate in any particular matter on which you lobbied or were registrable for under the Foreign Agents Registration Act within the previous 2 years and do not participate in the specific issue area in which that particular matter falls.
- Do not seek or accept employment with any government agency that you lobbied or engaged in registrable activity under FARA within the past 2 years.

*While you are a federally employee:*

- Do not accept any gifts from a registered lobbyist, including attendance at a widely attended gathering. There are a few exceptions (e.g., preexisting personal relationship, discount or benefit available to all government employees) but check with an ethics official for guidance.
- For 2 years from the date of your appointment, do not participate in any particular matter involving specific parties that is directly and substantially related to your former employer or former clients, including regulations and contracts.
  - Note: The definition of *former employer* excludes the federal government, state or local governments, D.C., Native American tribes, U.S. territories or possessions, or any international organization in which the U.S. is a member state. But under the federal impartiality rules, you will still have a one-year cooling off period with those entities (except if your former employer was already the US government).
- Any hiring or other employment decisions that you make will be based on the candidate's qualifications, competence and experience.
- Do not accept any salary or cash payment or any other non-cash benefit from a former employer for entering into government service.

*When you leave federal service, you are agreeing to the following:*

- If you are a "senior employee" subject to the one-year cooling off period under 18 U.S.C. § 207(c), your cooling off period will be extended by another year, for a total of two years.
- If you are a "senior employee" subject to either 18 U.S.C. § 207(c) or (d), for one year following your departure from federal service, you will not work behind the scenes to materially assist others in making communications or appearances to the United States Government that you would otherwise be unable to make under the post-employment restrictions.
- You will not lobby any covered executive branch official or non-career SES appointee for the remainder of this Administration or for 2 years following the end of your appointment, whichever is later.
- You will not engage in any activity on behalf of a foreign government or foreign political party



that would require you to register under the Foreign Agents Registration Act for the remainder of this Administrator or 2 years following the end of your appointment, whichever is later.

A copy of the Executive Order and the Biden Ethics Pledge that you must sign are included in this packet of materials.

#### **4. Financial Disclosure Reporting**

In your position, you are required to complete a public financial disclosure report as you begin the federal service and every year thereafter. You will file this report in INTEGRITY, an electronic system managed by the Office of Government Ethics. When you leave EPA, you will be required to submit a termination financial disclosure report. In addition, you are required to have one hour of ethics training as a new entrant (PAS appointees have an additional requirement for a specialized one-on-one ethics briefing), and also required to have one hour of ethics training each year. The Ethics Office in the Office of General Counsel (OGC/Ethics) provides your training either in person or virtually.

You must report any transaction of securities (stocks or bonds) over \$1000 on a periodic basis in INTEGRITY using the 278T. These periodic transactions must be reported the earlier of 30 days after learning of the transaction or 45 days after the transaction takes place. Failure to file timely results in late fees that are assessed as a matter of law.

In addition, you are required to notify OGC/Ethics within three days of beginning to negotiate for employment with any non-federal entity. To do so, use our Notification of Negotiation form.

Included in this packet of materials are reminders about the types of transactions that are to be reported periodically and not being tardy in filing any reports with OGC/Ethics.

#### **5. Attorney Client Privilege & FOIA**

By regulation, disclosure by an employee to an ethics official is not protected by the attorney-client privilege. 5 C.F.R. § 2635.107(b). This means that if our records (or yours) are requested under the Freedom of Information Act (FOIA), then we will not be able to redact our advice to you using the attorney-client privilege. However, we can -- and do -- assert personal privacy and deliberative process privileges where applicable. For example, the deliberative process privilege may apply to pre-decisional ethics advice documents, but please note that our final advice to you is generally releasable.

This should **not** stop you from seeking the advice of your ethics officials! Not only does it show you are being a steward of the public trust, but good faith reliance on advice received from your ethics officials after disclosing all relevant facts can shield you from disciplinary action and is a factor that the Department of Justice considers when deciding which cases they wish to prosecute.

#### **6. Conflicts of Interest**

Do not participate as an agency official in any matter if there is an actual conflict of interest or even the appearance of a conflict of interest. It's a crime to participate *personally and substantially* in *any particular matter* in which, to your knowledge, you or a person whose interests are imputed to you has a financial interest if the particular matter will have a *direct and predictable effect* on that interest.

Example: you own a lot of stock in XYZ Corporation, which is a chemical manufacturer. If your office is considering taking an enforcement action against XYZ Corporation, you must disqualify yourself from participating in the decision. Even if your mother gave your 10-year old twins the stock, you can't participate in the matter because their interest is imputed to you.

Remember, the interests of your spouse, dependent children, general business partner, and any organization in which you serve as officer, director, trustee or employee are imputed to you. This means that, under the criminal statute, it's the same thing as if you held those assets. So, you can't participate in any particular matter that may have a financial impact on the interests that are imputed to you.

## **7. Appearance of a Loss of Impartiality**

Even if an action is not strictly prohibited, it is prudent to be careful of any action that a reasonable person with knowledge of the relevant facts may perceive as a violation of the ethics rules, or (if applicable) your ethics pledge and the Executive Order. You must avoid even the appearance of a loss of impartiality when performing official duties.

When we consider impartiality, we expand the ambit of relationships beyond the conflicts realm of "imputed interests." We consider all of your "covered relationships," which includes a lot more people: anybody with whom you have a business, contractual or financial relationship that is more than just a routine consumer transaction; any member of your household or a relative with whom you are close; the employer/partner or prospective employer/partner of your spouse, parent or dependent child; any person or organization for which you have served in the last year as an officer, agent, employee, etc.; and any organization in which you are an active participant.

You should refrain from engaging in official acts that may be perceived as an "appearance problem" by a reasonable person (and the reasonable person is not you, but rather your ethics officials).

Ethics officials can provide advice and determine whether a proposed course of action is appropriate by issuing an impartiality determination, but we cannot provide cover if you have already done the deed.

## **8. No representation back to the federal government**

As a federal employee, you are prohibited from representing the interest of any other entity back to the federal government, whether you are paid for those services or not. For the purposes of these criminal statutes, 18 U.S.C. §§ 203 and 205, it does not matter that you are representing the interests of another in your private capacity. You cannot serve as agent or attorney for another entity back to the United States on a particular matter in which the US is a party or has a direct and substantial interest.



## **9. Acceptance of Gifts**

Be careful of any gift from people outside the Agency, particularly those that are worth more than \$20. Gifts are anything of value and include allowing others to pick up the lunch tab, free tickets, invitations to receptions, and lovely fruit baskets. There are only a few exceptions, so consult your ethics officials before accepting any gift. Remember, political appointees can't take gifts from federally registered lobbyists.

EPA does not have broad Agency gift authority, so prohibited gifts must be paid for or returned. You should also not generally accept gifts exceeding \$10 from EPA employees, nor give gifts exceeding \$10 to your superiors. There are some exceptions, so check with an ethics official. By the way, you may give gifts to any EPA person who makes less money than you provided that person is not your supervisor.

## **10. Attendance at Widely-Attended Gatherings (ethics check required)**

Your ethics official must make a written determination in advance as to whether your participation and attendance at certain events meet the criteria for a "widely attended gathering" exception of the gift rule. You can't make that determination yourself (nor can the sponsor of the event). For a WAG determination, your ethics official will consider the type of event, who is attending, and whether your attendance will further an Agency interest. This analysis must be done in writing and in advance of your attending the event. Any WAG that is approved is considered a gift to you, so you will be responsible for reporting the value of the gift on your financial disclosure report if it exceeds the reporting threshold. For political appointees, though, please bear in mind that this exception does not apply to federally registered lobbyists. Political appointees cannot accept free attendance at a widely attended gathering that is sponsored by or hosted by a federally registered lobbyist.

### **IMPORTANT NOTE about Embedding Ethics into Your Calendaring Process**

Many ethics issues typically arise through the calendaring process of an EPA principal. Since you are responsible for your ethics obligations, we know you might need a little help. To assist you in navigating calendar and invitation issues, the EPA Ethics Office offers specialized assistance to you and your front office staff to advise on invitations, gifts associated with those invitations, etc. Embedding ethics is a proactive counseling practice that brings together the Principals, their staff, and local Deputy Ethics Officials to establish a process for incorporating ethics vetting into your or the Principal's calendar. Contact Jennie Keith to get started!

## **11. Travel Issues**

Approval of gifts of travel, lodging and meals from non-Federal sources for meetings and similar events must be obtained from OGC/Ethics prior to the event. You can't accept such offerings on your own! We have an electronic form that we use to process such requests, and we must report the approvals to the Office of Government Ethics twice a year. See <http://intranet.epa.gov/ogc/ethics/travel.htm> . Prior to the pandemic, OGC/Ethics accepted over \$1 million each year in discretionary travel paid by non-federal sources.

## **12. Preferential Treatment of Non-Federal Entities (Endorsement)**

Be careful about showing preferential treatment to any entity. We cannot endorse the products, services or enterprises of another, so you need to be careful about extolling the virtues of a regulated entity, a particular contractor or applicant, etc. Seek ethics advice before collaborating with non-federal entities on initiatives and events because not all of EPA's statutes allow us to cooperate with non-feds.

## **13. Political Activities**

You are now bound by the Hatch Act, which governs the political activity of federal employees, even in your personal capacity. Career SES employees are bound by even more restrictions, while Presidentially Appointed and Senate Confirmed (PAS) employees enjoy more liberties. Do not rely on what you think other people can do; find out for yourself by asking your ethics officials.

Some limitations under the Hatch Act are 24/7, meaning that you have restrictions even on your time. For example, you are never permitted to solicit, accept or receive political contributions, not even in your personal time. You can never use your EPA title or position to fundraise in connection with any political activity. Because the Hatch Act rules vary depending on your type of appointment, please see the attached chart and consult your ethics officials.

## **14. Lobbying Issues**

EPA employees cannot use appropriated funds to engage in indirect or grassroots lobbying regarding any legislative proposal. Indirect or grassroots lobbying generally means urging members of special interest groups or the general public to contact legislators to support or oppose a legislative proposal. EPA employees cannot make explicit statements to the public to contact members of Congress in support of or in opposition to a legislative proposal. Other prohibited grassroots lobbying includes an employee's explicit request, while on official time, to an outside group asking it to contact Congress to support or oppose EPA's appropriations bill.

In addition, EPA is prohibited from using appropriated funds for activities that would "tend to promote" the public to contact Congress in support of or in opposition to a legislative proposal, even if an EPA employee does not expressly state that the public should contact Congress. This activity is considered "indirect lobbying" and is prohibited. You may, after coordinating with OCIR and Public Affairs, directly contact or lobby members of Congress and their staffs regarding the Administration's legislative proposals. Again, after getting approval from OCIR, you may also educate and inform the public of the Administration's position on legislative proposals by delivering speeches and making public remarks explaining the Administration's position on a legislative proposal.

## **15. Use of Government Personnel and Resources**

EPA policy permits employees to “limited use” of government equipment, including the telephone, copying machines, fax machines, etc. Employees cannot, however, engage in outside activity or employment on government time. GSA regulations also prohibit any fundraising on federal property (except for the Combined Federal Campaign), so employees cannot raise money for their favorite charity (i.e., sell cookies, candy or wrapping paper for a “good cause”). They also cannot use the internet connection for gambling or to access pornography. See EPA’s [Limited Personal Use of Government Equipment Policy](#). Avoid using your EPA email address for personal matters, and do not use your personal email address for EPA matters.

## **16. Outside Activities**

We were advised by the Biden Presidential Transition Team that non-PAS political appointees may have outside positions that are consistent with federal ethics regulations, including the Agency’s ethics regulations. Non-Career SES and Schedule C appointees must seek prior approval from EPA Ethics for certain outside activity consistent with EPA’s Supplemental Ethics Regulations at [5 C.F.R. § 6401.103](#). Examples of activity that require prior approval are practicing a profession or teaching, speaking or writing on subjects related to EPA programs, policies or operations. While there is a *de minimis* use of government equipment, that never applies to any compensated outside activity.

Most EPA employees may not receive any compensation for teaching, speaking or writing (including consulting) that relates in significant part to your assigned EPA duties, duties to which you’ve been assigned in the previous year, or to any ongoing Agency program, policy or operation. But if you are a non-career SES employee, then your restriction is even broader: you may not receive compensation at all for any teaching, speaking or writing that relates to your official duties or even to EPA’s general subject matter area, industry, or economic sector primarily affected by EPA’s programs and operations. [5 C.F.R. § 2635.807\(a\)\(2\)\(i\)\(E\)\(3\)](#).

Non-Career SESers must also abide by these additional restrictions:

- You are subject to the outside earned income cap that is set each January. As of January 2021, that amount is \$29,595. See [5 C.F.R. § 2635.804\(b\)](#) and [5 C.F.R. § 2636.304](#). This amount changes each year;
- You cannot receive compensation for practicing a profession that involves a fiduciary relationship; affiliating with or being employed by a firm or other entity that provides professional services involving a fiduciary relationship; or teaching without prior approval. See note to [5 C.F.R. § 2635.804\(b\)](#) and [5 C.F.R. § 2636.305](#);
- You may be permitted to serve as an officer or member of the board of any association, corporation or other entity, but cannot be compensated for such service. [See 5 C.F.R. § 2636.306](#); and
- You may not receive compensation for any other teaching unless specifically authorized in advance by OGC/Ethics (specifically, the Designated or Alternate Designated Agency Ethics Official listed on the first page of this briefing material). [See 5 C.F.R. § 2636.307](#).

## **17. Ethics Obligations of Supervisors**

If you are a supervisor, you must model ethical behavior for your staff. Set forth below are your additional ethics responsibilities, found at [5 C.F.R. § 2638.103](#):

Every supervisor in the executive branch has a heightened personal responsibility for advancing government ethics. It is imperative that supervisors serve as models of ethical behavior for subordinates. Supervisors have a responsibility to help ensure that subordinates are aware of their ethical obligations under the [Standards of Conduct](#) and that subordinates know how to contact [agency ethics officials](#). Supervisors are also responsible for working with agency ethics officials to help resolve conflicts of interest and enforce government ethics laws and regulations, including those requiring certain employees to file financial disclosure reports. In addition, supervisors are responsible, when requested, for assisting agency ethics officials in evaluating potential conflicts of interest and identifying positions subject to financial disclosure requirements.

Your staff may ask you ethics questions, but unless you are an ethics official, you are not authorized to answer those ethics questions. If you receive an ethics question, then contact your own local Deputy Ethics Official or notify OGC/Ethics at [ethics@epa.gov](mailto:ethics@epa.gov).

## **18. Seeking Employment**

It's always odd to talk about seeking employment when we are welcoming you to EPA, but be mindful of the fact that there are restrictions that will apply. You won't be able to participate in a particular matter involving a party with which you are seeking employment, and that obligation starts as soon as you directly or indirectly contact a prospective employer, or as soon as you get a response expressing interest in you. You will need to disqualify yourself from particular matters that may affect the prospective employer.

## **19. Negotiating for Employment**

Should your pursuit of future employment advance to "negotiating" for employment with a particular entity, then you will have conflicts of interest. The financial interests of any person or entity with whom you are "negotiating" for employment are imputed to you for the purposes of the criminal conflict of interest statute, 18 U.S.C. § 208. You will need to recuse yourself from participating in any particular matter that will have a direct and predictable effect upon the interests of the prospective employer, either as a specific party or as a member of a class, which will include particular matters that apply generally to the prospective employer's industry or class.

Filers of the public financial disclosure report are further subject to the Ethics In Government Act, as amended by the STOCK Act, which requires you to notify OGC/Ethics within three days of commencing negotiations for future employment with a non-federal employer. Yes, we have a form for that notification.

## **20. Post-Government Employment - Representational Restrictions**

Even after you leave federal service, there are federal post-employment restrictions. Your pledge restrictions are supplementary to these restrictions. Your ethics officials are still available to answer your post-employment questions, even after you leave EPA. You will need to have an exit discussion with OGC/Ethics before you leave EPA, but here are the highlights of what we'll discuss regarding the federal law. You will also be bound by the additional restrictions of the Biden Ethics Pledge adumbrated on pp. 2-3 of this briefing material.

### **Lifetime bar - on particular matters that you worked on**

You will be prohibited by criminal statute from representing back to the federal government on any particular matter involving specific parties in which you participated personally and substantially while in federal service. "Representation back" means making an appearance or communication, on behalf of another, with the intent to influence an official action. And the matter must involve the United States or be one in which the US has an interest.

Example: You are asked by XYZ Corporation to contact EPA about seeking an exemption so that a particular permit you granted while in your position no longer applies to them. You cannot do that because you worked on that matter while at EPA. You are permanently barred from representing another back to the federal government on that same matter.

### **2-year bar - on EPA matters pending during your last year in federal service**

You are prohibited (again, by criminal statute) from representing back to the federal government on any particular matter involving specific parties that was pending under your official responsibility during your last year of federal service. Even if you recuse yourself from a matter, you are still bound by the two-year bar. You are not permanently restricted, since you didn't work on the matter personally and substantially, but you are prohibited from representing another back to the federal government on that matter for two years.

### **Senior Employee "cooling off restriction" – on any matter**

Depending on your rate of pay, you may be considered a "senior official" and will be restricted for one year from making any contact with EPA following your departure (under the federal ethics regulation). Political appointees have additional time restrictions under the Biden Ethics Pledge. This prohibition is not limited to particular matters. Rather, you cannot knowingly make any communication or appearance to EPA employees on behalf of another with the intent to influence in connection with any matter in which you seek official EPA action.

Effective January 3, 2021, the defining rate of pay for "senior officials" is [\\$172,395 per year](#) (excluding locality pay). If you make more than that (before locality pay), then you are a "senior employee" and will be bound by the cooling off period. By the way, SESers do not get locality pay so, most likely, any SESer will be a "senior employee" and subject to this restriction.

Welcome to EPA and thank you for keeping ethics in the forefront of all we do!



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Washington, D.C. 20460

January 22, 2021

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

SUBJECT: Timely filing of Public Financial Disclosure and Periodic Transaction Reports

FROM: Justina Fugh **Justina Fugh** Digitally signed by Justina Fugh  
Date: 2021.01.22 12:07:49  
-05'00'  
Alternate Designated Agency Ethics Official

TO: All EPA Political Appointees

In 1978, Congress enacted the Ethics In Government Act, 5 U.S.C. app. to establish the Executive Branch financial disclosure reporting system that requires mandatory public disclosure of financial and employment information of certain officials and their immediate families. Because you occupy a designated position, you are required by this law to file these reports in the electronic system, *INTEGRITY*. As an executive branch employee, you are bound by federal ethics laws and regulations, including prohibitions against financial conflicts of interest and loss of impartiality. Your disclosures allow the Office of General Counsel's Ethics Office (OGC/Ethics) to assist you in identifying and addressing potential or actual conflicts of interest in order to maintain the integrity of the Agency's programs and operations. These reports are publicly available upon request and the reports of certain Presidential Appointees confirmed by the Senate will be posted on the U.S. Office of Government Ethics' website at [www.oge.gov](http://www.oge.gov).

This memorandum formally informs you that you are required by law to file timely and accurate Public Financial Disclosure Reports (OGE 278e)<sup>1</sup> and Periodic Transaction Reports (OGE 278-Ts).<sup>2</sup> **Filing a late report will result in a \$200 late filing fee** unless you formally request and receive a waiver of the late fee from me or the Designated Agency Ethics Official (DAEO), Jim Payne, after describing extraordinary circumstances that caused you to file a late report.<sup>3</sup> **Unpaid late fees are subject to the Agency's<sup>4</sup> and the government's debt collection procedures and will be referred for collection if left unpaid after 30 days.**

Please refer to this chart for your filing obligations:

<sup>1</sup> See 5 U.S.C. app. § 101; 5 C.F.R. § 2634.201.

<sup>2</sup> Pub. L. 112-105 § 11 (STOCK Act).

<sup>3</sup> See 5 U.S.C. app. § 104(d)(1); 5 C.F.R. § 2634.704(a).

<sup>4</sup> See Resource Management Directive System 2540-03-P2 dated 07/12/2016.

OGE 278e - New Entrant reports	<b>Within 30 days</b> of entering a covered position (either by appointment to a permanent or acting in covered position)
OGE 278e – Incumbent reports	<b>No later than May 15</b>
OGE 278e – Termination reports	<b>No later than 30 days after</b> leaving a covered position (either through reassignment, resignation, or the end of acting in a covered position) (Reports may be submitted within 15 days prior to termination)
OGE 278T – Periodic transaction reports <sup>5</sup>	<b>The <i>earlier of</i> 30 days</b> after learning of a transaction or <b>45 days</b> of the transaction taking place.

How to request an extension of the filing deadline:

For good cause (e.g., travel, workload issues, sickness), you may request up to two 45-day extensions. Submit the request by email, including the reason, to [ethics@epa.gov](mailto:ethics@epa.gov) **prior to the due date**. Extensions cannot be granted after the due date has passed.

How to request the waiver of a late filing fee:

If *extraordinary circumstances* prevented you from meeting the deadline and OGC/Ethics assessed a late fee, you may request a waiver of the late fee. *See* 5 C.F.R. § 2634.704. Submit your request in writing to [ethics@epa.gov](mailto:ethics@epa.gov) describing the extraordinary circumstances and provide any supporting documentation. Please note that vacations or routine work obligations are not “extraordinary” circumstances. The decision to grant or deny a waiver is at the sole discretion of the DAEO/ADAEO and is final.

Your colleagues in OGC/Ethics are available to provide assistance but it is always your obligation to file your reports timely and accurately. In fact, ethics regulations *require* that we refer individuals to the Department of Justice (DOJ) when there is reasonable cause to believe that they have willfully failed to file a required report or provide the information that the report requires. The current maximum civil penalty is \$56,216.<sup>6</sup>

As public servants, we hope that you will take your ethics obligations seriously. As such, we expect you to make a good faith effort to adhere to the timeliness and completeness requirements of your financial disclosure reporting obligations. If you have any questions, please contact [ethics@epa.gov](mailto:ethics@epa.gov).

ATTACHMENT - *When to Report Transactions on the OGE 278 and OGE 278-T*

<sup>5</sup> See attached guidance – *When to Report Transactions on the OGE 278 and OGE 278-T*.

<sup>6</sup> In 2012, OGC/Ethics referred an individual to DOJ for failure to file a termination report despite repeated reminders and entreaties. That individual paid a civil penalty of \$15,000 and still had to file the termination report.



# When to Report Transactions

DUE DATE: The earlier of the following: 30 Days from Notification or 45 Days from Transaction

	Periodic Transaction Report	Annual and/or Termination Report
Investment Assets	Report on the OGE 278-T?	Report on Part 7 of the OGE 278e?
Transactions of \$1,000 or less		
• Any asset in which the transaction amount is \$1,000 or less regardless of the type of asset or who owns the asset	No	No
Your investment assets (or jointly held)		
• Your stocks	Yes	Yes
• Your bonds (except U.S. Treasury securities)	Yes	Yes
• Your commodity futures	Yes	Yes
• Your other investment securities	Yes	Yes
• Assets listed above in your (joint) brokerage accounts, (joint) managed accounts, IRAs, other retirement accounts, and/or other (joint) investment vehicles	Yes	Yes
Your spouse's investment assets		
• Spouse's stocks	Yes	Yes
• Spouse's bonds (except U.S. Treasury securities)	Yes	Yes
• Spouse's commodity futures	Yes	Yes
• Spouse's other investment securities	Yes	Yes
• Assets listed above in spouse's <u>own</u> brokerage account, managed accounts, IRAs, other retirement accounts, and/or other investment vehicles	Yes	Yes
Your dependent child's investment assets		
• Dependent child's stocks	Yes	Yes
• Dependent child's bonds (except U.S. Treasury securities)	Yes	Yes
• Dependent child's commodity futures	Yes	Yes
• Dependent child's other investment securities	Yes	Yes
• Assets listed above in dependent child's <u>own</u> brokerage account, IRAs, and/or other investment vehicles	Yes	Yes
Other investment assets irrespective of ownership		
• Real Property	No	Yes <sup>1</sup>
• Mutual funds, exchange traded funds, index funds and/or other "excepted investment funds" <sup>2</sup>	No	Yes
• Any asset in which the transaction amount is \$1,000 or less	No	No
• Cash accounts (deposits and/or withdrawals)	No	No
• Money market accounts	No	No
• Money market funds	No	No
• Certificates of deposits	No	No
• US Treasury Securities (e.g., T bills, Treasury bonds, U.S. savings bonds)	No	No
• Federal Government Retirement Accounts (e.g., Thrift Savings Plan)	No	No
• Life insurance and annuities	No	No
• Collectibles	No	No
• Assets held within an excepted trust <sup>3</sup>	No	No
• Transfer of assets between you, your spouse, and your dependent children	No	No



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<sup>1</sup> Do not report the purchase or sale of your personal residence on Part 7 unless you rent it out at any time during the reporting period.

<sup>2</sup> To be an excepted investment fund (EIF), the asset must be:

- (a) widely held (more than 100 participants),
- (b) independently managed – arranged so that you neither exercise control nor have the ability to exercise control over the financial interests held by the fund, and
- (c) publicly traded (or available) or widely diversified.

Managed accounts, investment clubs, trusts, 529 accounts, brokerage accounts, and individual retirement accounts (IRAs) are not excepted investment funds in and of themselves. It may be that individual assets held within these types of investment vehicles may qualify as EIFs if, for example, your IRA holds a publicly-traded mutual fund. But the fact that you have a managed account does not absolve you of your reporting requirements. That account is legally owned by you, and you're responsible for its assets and reporting transactions. If you have questions, contact [ethics@epa.gov](mailto:ethics@epa.gov).

<sup>3</sup> OGC/Ethics must determine that your trust qualifies as an “excepted trust.” For help, email [ethics@epa.gov](mailto:ethics@epa.gov).

**REQUIREMENT: Notify OGC/Ethics within 3 business days of commencing the negotiation or agreement for post-government employment or compensation**

## NOTIFICATION OF NEGOTIATION OR AGREEMENT

Your full name

Your telephone number\*

Date negotiation or agreement began

Your Title / Office / AAship or Region

Your email address\*

Name of non-federal entity that you are negotiating with or have an agreement for employment or compensation

*\* Provide information for OGC/Ethics to use to contact you as part of our official duty. For this purpose, you may provide a personal email address or cell number.*

## RECUSAL STATEMENT

To assist in identifying your recusal obligations, check the appropriate boxes below:

- |    | Yes                      | No                       |   |
|----|--------------------------|--------------------------|---|
| 1. | <input type="checkbox"/> | <input type="checkbox"/> | EPA's programs, policies, or operations affect the non-federal entity with which I am seeking employment.   |
| 2. | <input type="checkbox"/> | <input type="checkbox"/> | My office in EPA does work that affects the non-federal entity with which I am seeking employment.          |
| 3. | <input type="checkbox"/> | <input type="checkbox"/> | The work I participate in affects or will affect the non-federal entity with which I am seeking employment. |

Need help answering these statements?  
See page 2.

**For as long as I am negotiating for, or have an agreement of, employment or compensation with the entity listed above, I will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of this entity, unless I first obtain from OGC/Ethics a written authorization or waiver consistent with 5 C.F.R. § 2635.605 or 18 U.S.C. § 208(b)(1). I understand that it is my responsibility to consult with OGC/Ethics if I have questions regarding my recusal obligations.**

Sign and submit to [ethics@epa.gov](mailto:ethics@epa.gov):

Your signature

OGC/Ethics Use Only:

**Statement 1: EPA’s programs, policies, or operations affect the non-federal entity with which I am seeking employment.**

If your answer is “yes” to any of the following questions, then you must answer “yes” to statement 1.

- Is the non-federal entity seeking official action from EPA (even if not your own office)?
- Does the non-federal entity do business or seek to do business with the EPA (even if not your own office)?
- Does the non-federal entity conduct activities that EPA regulates (even if not in your own office)?
- Does the non-federal entity have interests that may be substantially affected by the performance or non-performance of your official duties?
- Is the non-federal entity a membership organization in which the majority of the members are described in the preceding questions?

**Statement 2: My office in EPA does work that affects the non-federal entity with which I am seeking employment.**

To answer this question, think about the nexus between the work of your office and the non-federal entity. The closer the nexus, the more likely you will have to check “yes” to statement 2.

- Consider the particular matters your office works on and whether there is any connection to the work of this entity. Does your office work on permits, investigations, litigation, grants, licenses, contracts, applications, enforcement cases, or other similar types of matters where there is an identified non-federal entity (i.e., particular matters involving specific parties)?
- Also consider whether your office is involved in scientific programs, media programs, or other types of policies, procedures, guidance documents, regulations, etc., that would affect this particular industry or sector (i.e., particular matters of general applicability).

**Statement 3: The work I participate in affects or will affect the non-federal entity with which I am seeking employment.**

Think about the nexus between your work and the non-federal entity as well as its respective class, industry or sector. The closer the nexus between your work and the sector the non-federal entity belongs to, the more likely you will check have to check “yes” to statement 3.

- Will the work you do affect the sector? Don’t concentrate on whether your personal contributions will be determinative but rather, overall, how the outcome of the work itself will affect the sector and the non-federal entity with which you are negotiating.
- Do you advise on or consult with your colleagues’ projects and work? Does their work affect this sector or the non-federal entity?
- Do you actively supervise or assign work to subordinates? Do those assignments affect the sector or the non-federal entity?

**Need help answering these statements? Contact [ethics@epa.gov](mailto:ethics@epa.gov) to discuss.**

## Political Activities and Federal Employees

The Hatch Act, enacted in 1939, was amended in 1993 and 2012. It regulates the political activities of executive branch employees, excluding the President and Vice President. The following table summarizes what political activities EPA employees can and cannot do based on their appointment. Note: Public Health Service officers must adhere to 45 CFR Part 73, Subpart F, which is most similar to the Career SES/ALJ column.

**Political activity means an activity “directed toward the success or failure of a political party, a candidate for partisan political office, or a partisan political group.”**

Type of Activity	PAS*	Non-Career SES, Schedule C*, Title 42, SL/ST, AD*, GS, Other	Career SES, ALJs
<b>Personal (off premises and off duty)</b>			
Express support for or opposition to a political candidate when off duty	Yes	Yes	Yes
Run as a partisan candidate for nomination or office in a partisan election	No	No	No
Solicit and accept contributions for your campaign in a non-partisan election	Yes	Yes	Yes
Solicit a contribution from a member of your union	N/A	Yes	N/A
Work a phone bank asking individuals to volunteer	Yes	Yes	No
Campaign on behalf of a candidate in a partisan election	Yes	Yes	No
Be active on behalf of a candidate at political rallies or meetings	Yes	Yes	No
Attend political rallies and meetings	Yes	Yes	Yes
Contribute money to political organizations	Yes	Yes	Yes
Work in non-partisan voter registration drives	Yes	Yes	Yes
Work in partisan voter registration drives	Yes	Yes	No
Register and vote	Yes	Yes	Yes
Sign a nominating petition	Yes	Yes	Yes
Distribute campaign material in a partisan election	Yes	Yes	No
Work as an election judge, poll watcher, clerical worker on election day and receive compensation for that work	Yes	Yes	Yes but nonpartisan only
Drive people to polling station on behalf of a campaign	Yes	Yes	No
<b>Affecting Official Resources</b>			
Use office time for political activity	Yes; IG-No	No	No
Use official space for political activity in general	Yes; IG-No	No	No
<b>Fundraising</b>			
Attend a political fundraiser	Yes	Yes	Yes
Solicit, accept or receive political contributions in general	No	No	No
Solicit or receive a political contribution on government premises	No	No	No
Plan or organize a political fundraiser when off duty	Yes	Yes	No
Sponsor, host, or allow your name as sponsor/host for a political fundraiser	No	No	No
Serve drinks or check coats at a political fundraiser	Yes	Yes	No
Speak at a partisan fundraiser without appealing for money	Yes	Yes	No
Allow only your name to be listed as speaker on fundraising invitation	Yes	Yes	No

\*PAS = Political Appointee Confirmed by the Senate; Schedule C = political appointees not confirmed by Senate; AD = Administratively Determined; SES = Senior Executive Service



# EPA Ethics Program

Counseling Practice Area:

Vetting Invitations

## Quick Summary:

One of the more visible ways ethics issues arise are those that come up during the calendaring of events and invitations for an EPA principal and their immediate staff. The ethics issues run the whole gambit:

Recusal Obligations ♦ Gifts ♦ Fundraising ♦ Political Activity ♦ Endorsements  
President's Ethics Pledge ♦ Misuse of Position

Embedding ethics is a proactive counseling practice that brings together the Principals, their immediate staff, and Deputy Ethics Officials to establish a process for incorporating ethics vetting into the Principal's calendar. This helps and supports the EPA principal to meet their ethics obligations and maintain integrity of agency programs and operations.

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## Who:

Principals (Administrator, Deputy Administrator, Assistant Administrators, and Regional Administrators, certain Deputy Associate Administrators), their immediate staff, and Deputy Ethics Officials.

## What:

Preventing conflicts of interest and other ethics issues by embedding ethics review into the calendaring process for principals.

## When:

Upon the appointee's start of EPA service

## Where:

Through coordination in the principal's front office and immediate staff

## Why:

Principals and other political appointees encounter frequent ethics issues arising through acceptance of external events, travel, and meetings with external participants. With increased public scrutiny and ethics legal frameworks, this is a high risk area in the ethics program. It is the principal's responsibility to avoid ethics issues and to maintain public trust in government.

## How:

To navigate these ethics issues, we establish a process, use standard event information gathering forms, and train periodically, so a principal's front office can obtain all relevant information for an event and ethics officials can advise appropriately and timely prior to acceptance.

# Executive Order on Ethic Commitments by Executive Branch Personnel

JANUARY 20, 2021 • [PRESIDENTIAL ACTIONS](#)

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and sections 3301 and 7301 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Ethics Pledge. Every appointee in every executive agency appointed on or after January 20, 2021, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee:

“I recognize that this pledge is part of a broader ethics in government plan designed to restore and maintain public trust in government, and I commit myself to conduct consistent with that plan. I commit to decision-making on the merits and exclusively in the public interest, without regard to private gain or personal benefit. I commit to conduct that upholds the independence of law enforcement and precludes improper interference with investigative or prosecutorial decisions of the Department of Justice. I commit to ethical choices of post-Government employment that do not raise the appearance that I have used my Government service for private gain, including by using confidential information acquired and relationships established for the benefit of future clients.

“Accordingly, as a condition, and in consideration, of my employment in the United States Government in a position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:

“1. Lobbyist Gift Ban. I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.

“2. Revolving Door Ban — All Appointees Entering Government. I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

“3. Revolving Door Ban — Lobbyists and Registered Agents Entering Government. If I was registered under the Lobbying Disclosure Act, 2 U.S.C. 1601 et seq., or the Foreign Agents Registration Act (FARA), 22 U.S.C. 611 et seq., within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:

(a) participate in any particular matter on which I lobbied, or engaged in registrable activity under FARA, within the 2 years before the date of my appointment;

(b) participate in the specific issue area in which that particular matter falls; or

(c) seek or accept employment with any executive agency with respect to which I lobbied, or engaged in registrable activity under FARA, within the 2 years before the date of my appointment.

“4. Revolving Door Ban — Appointees Leaving Government. If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, and its implementing regulations, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment. I will abide by these same restrictions with respect to communicating with the senior White House staff.

“5. Revolving Door Ban — Senior and Very Senior Appointees Leaving Government. If, upon my departure from the Government, I am covered by the post-employment restrictions set forth in sections 207(c) or 207(d) of title 18, United States Code, and those sections’ implementing regulations, I agree that, in addition, for a period of 1 year following the end of my appointment, I will not materially assist others in making communications or appearances that I am prohibited from undertaking myself by (a) holding myself out as being available to engage in lobbying activities in support of any such communications or appearances; or (b) engaging in any such lobbying activities.

“6. Revolving Door Ban — Appointees Leaving Government to Lobby. In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee, or engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2021, would require that I register under FARA, for the remainder of the Administration or 2 years following the end of my appointment, whichever is later.

“7. Golden Parachute Ban. I have not accepted and will not accept, including after entering Government, any salary or other cash payment from my former employer the eligibility for and payment of which is limited to individuals accepting a position in the United States Government. I also have not accepted and will not accept any non-cash benefit from my former employer that is provided in lieu of such a prohibited cash payment.

“8. Employment Qualification Commitment. I agree that any hiring or other employment decisions I make will be based on the candidate’s qualifications, competence, and experience.

“9. Assent to Enforcement. I acknowledge that the Executive Order entitled ‘Ethics Commitments by Executive Branch Personnel,’ issued by the President on January 20, 2021, which I have read before signing this document, defines certain of the terms applicable to the foregoing obligations and sets forth the methods for enforcing them. I expressly accept the provisions of that Executive Order as a part of this agreement and as binding on me. I understand that the terms of this pledge are in addition to any statutory or other legal restrictions applicable to me by virtue of Federal Government service.”

Sec. 2. Definitions. For purposes of this order and the pledge set forth in section 1 of this order:

(a) “Executive agency” shall include each “executive agency” as defined by section 105 of title 5, United States Code, and shall include the Executive Office of the President; provided, however, that “executive agency” shall include the United States Postal Service and Postal Regulatory Commission, but shall exclude the Government Accountability Office.

(b) “Appointee” shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

(c) “Gift”:

(i) shall have the definition set forth in section 2635.203(b) of title 5, Code of Federal Regulations;

(ii) shall include gifts that are solicited or accepted indirectly, as defined in section 2635.203(f) of title 5, Code of Federal Regulations; and



(iii) shall exclude those items excluded by sections 2635.204(b), (c), (e)(1) and (3), and (j) through (l) of title 5, Code of Federal Regulations.

(d) “Covered executive branch official” and “lobbyist” shall have the definitions set forth in section 1602 of title 2, United States Code.

(e) “Registered lobbyist or lobbying organization” shall mean a lobbyist or an organization filing a registration pursuant to section 1603(a) of title 2, United States Code, and in the case of an organization filing such a registration, “registered lobbyist” shall include each of the lobbyists identified therein.

(f) “Lobby” and “lobbied” shall mean to act or have acted as a registered lobbyist.

(g) “Lobbying activities” shall have the definition set forth in section 1602 of title 2, United States Code.

(h) “Materially assist” means to provide substantive assistance but does not include providing background or general education on a matter of law or policy based upon an individual’s subject matter expertise, nor any conduct or assistance permitted under section 207(j) of title 18, United States Code.

(i) “Particular matter” shall have the same meaning as set forth in section 207 of title 18, United States Code, and section 2635.402(b)(3) of title 5, Code of Federal Regulations.

(j) “Particular matter involving specific parties” shall have the same meaning as set forth in section 2641.201(h) of title 5, Code of Federal Regulations, except that it shall also include any meeting or other communication relating to the performance of one’s official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.

(k) “Former employer” is any person for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner, except that “former employer” does not include any executive agency or other entity of the Federal Government, State or local government, the District of Columbia, Native American tribe, any United States territory or possession, or any international organization in which the United States is a member state.

(l) “Former client” is any person for whom the appointee served personally as agent, attorney, or consultant within the 2 years prior to the date of his or her appointment, but excluding instances where the service

provided was limited to speeches or similar appearances. It does not include clients of the appointee's former employer to whom the appointee did not personally provide services.

(m) "Directly and substantially related to my former employer or former clients" shall mean matters in which the appointee's former employer or a former client is a party or represents a party.

(n) "Participate" means to participate personally and substantially.

(o) "Government official" means any employee of the executive branch.

(p) "Administration" means all terms of office of the incumbent President serving at the time of the appointment of an appointee covered by this order.

(q) "Pledge" means the ethics pledge set forth in section 1 of this order.

(r) "Senior White House staff" means any person appointed by the President to a position under sections 105(a)(2)(A) or (B) of title 3, United States Code, or by the Vice President to a position under sections 106(a)(1)(A) or (B) of title 3.

(s) All references to provisions of law and regulations shall refer to such provisions as are in effect on January 20, 2021.

Sec. 3. Waiver. (a) The Director of the Office of Management and Budget (OMB), in consultation with the Counsel to the President, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of OMB certifies in writing:

(i) that the literal application of the restriction is inconsistent with the purposes of the restriction; or

(ii) that it is in the public interest to grant the waiver. Any such written waiver should reflect the basis for the waiver and, in the case of a waiver of the restrictions set forth in paragraphs 3(b) and (c) of the pledge, a discussion of the findings with respect to the factors set forth in subsection (b) of this section.

(b) A waiver shall take effect when the certification is signed by the Director of OMB and shall be made public within 10 days thereafter.

(c) The public interest shall include, but not be limited to, exigent circumstances relating to national security, the economy, public health, or the environment. In determining whether it is in the public interest to grant a waiver of the restrictions contained in paragraphs 3(b) and (c) of the pledge, the responsible official may consider the following factors:

- (i) the government's need for the individual's services, including the existence of special circumstances related to national security, the economy, public health, or the environment;
- (ii) the uniqueness of the individual's qualifications to meet the government's needs;
- (iii) the scope and nature of the individual's prior lobbying activities, including whether such activities were de minimis or rendered on behalf of a nonprofit organization; and
- (iv) the extent to which the purposes of the restriction may be satisfied through other limitations on the individual's services, such as those required by paragraph 3(a) of the pledge.

Sec. 4. Administration. (a) The head of every executive agency shall, in consultation with the Director of the Office of Government Ethics, establish such rules or procedures (conforming as nearly as practicable to the agency's general ethics rules and procedures, including those relating to designated agency ethics officers) as are necessary or appropriate to ensure:

- (i) that every appointee in the agency signs the pledge upon assuming the appointed office or otherwise becoming an appointee;
- (ii) that compliance with paragraph 3 of the pledge is addressed in a written ethics agreement with each appointee to whom it applies, which agreement shall also be approved by the Counsel to the President prior to the appointee commencing work;
- (iii) that spousal employment issues and other conflicts not expressly addressed by the pledge are addressed in ethics agreements with appointees or, where no such agreements are required, through ethics counseling; and
- (iv) that the agency generally complies with this order.

(b) With respect to the Executive Office of the President, the duties set forth in section 4(a) of this order shall be the responsibility of the Counsel to the President.

(c) The Director of the Office of Government Ethics shall:

(i) ensure that the pledge and a copy of this order are made available for use by agencies in fulfilling their duties under section 4(a) of this order;

(ii) in consultation with the Attorney General or the Counsel to the President, when appropriate, assist designated agency ethics officers in providing advice to current or former appointees regarding the application of the pledge; and

(iii) in consultation with the Attorney General and the Counsel to the President, adopt such rules or procedures as are necessary or appropriate:

(A) to carry out the foregoing responsibilities;

(B) to authorize limited exceptions to the lobbyist gift ban for circumstances that do not implicate the purposes of the ban;

(C) to make clear that no person shall have violated the lobbyist gift ban if the person properly disposes of a gift as provided by section 2635.206 of title 5, Code of Federal Regulations;

(D) to ensure that existing rules and procedures for Government employees engaged in negotiations for future employment with private businesses that are affected by the employees' official actions do not affect the integrity of the Government's programs and operations;

(E) to ensure, in consultation with the Director of the Office of Personnel Management, that the requirement set forth in paragraph 6 of the pledge is honored by every employee of the executive branch;

(iv) in consultation with the Director of OMB, report to the President on whether full compliance is being achieved with existing laws and regulations governing executive branch procurement lobbying disclosure. This report shall include recommendations on steps the executive branch can take to expand, to the fullest extent practicable, disclosure of both executive branch procurement lobbying and of lobbying for Presidential pardons. These recommendations shall include both immediate actions the executive branch can take and, if necessary, recommendations for legislation; and

(v) provide an annual public report on the administration of the pledge and this order.

(d) The Director of the Office of Government Ethics shall, in consultation with the Attorney General, the Counsel to the President, and the Director of the Office of Personnel Management, report to the President on steps the executive branch can take to expand to the fullest extent practicable the revolving door ban set forth in paragraph 5 of the pledge to all executive branch employees who are involved in the procurement process such that they may not for 2 years after leaving Government service lobby any Government official regarding a Government contract that was under their official responsibility in the last 2 years of their Government service. This report shall include both immediate actions the executive branch can take and, if necessary, recommendations for legislation.

(e) All pledges signed by appointees, and all waiver certifications with respect thereto, shall be filed with the head of the appointee's agency for permanent retention in the appointee's official personnel folder or equivalent folder.

Sec. 5. Enforcement. (a) The contractual, fiduciary, and ethical commitments in the pledge provided for herein are solely enforceable by the United States pursuant to this section by any legally available means, including debarment proceedings within any affected executive agency or judicial civil proceedings for declaratory, injunctive, or monetary relief.

(b) Any former appointee who is determined, after notice and hearing, by the duly designated authority within any agency, to have violated his or her pledge may be barred from lobbying any officer or employee of that agency for up to 5 years in addition to the time period covered by the pledge. The head of every executive agency shall, in consultation with the Director of the Office of Government Ethics, establish procedures to implement this subsection, which procedures shall include (but not be limited to) providing for fact-finding and investigation of possible violations of this order and for referrals to the Attorney General for consideration pursuant to subsection (c) of this order.

(c) The Attorney General is authorized:

(i) upon receiving information regarding the possible breach of any commitment in a signed pledge, to request any appropriate Federal investigative authority to conduct such investigations as may be appropriate; and

(ii) upon determining that there is a reasonable basis to believe that a breach of a commitment has occurred or will occur or continue, if not enjoined, to commence a civil action against the former employee in any United States District Court with jurisdiction to consider the matter.

(d) In any such civil action, the Attorney General is authorized to request any and all relief authorized by law, including but not limited to:

(i) such temporary restraining orders and preliminary and permanent injunctions as may be appropriate to restrain future, recurring, or continuing conduct by the former employee in breach of the commitments in the pledge he or she signed; and

(ii) establishment of a constructive trust for the benefit of the United States, requiring an accounting and payment to the United States Treasury of all money and other things of value received by, or payable to, the former employee arising out of any breach or attempted breach of the pledge signed by the former employee.

Sec. 6. General Provisions. (a) If any provision of this order or the application of such provision is held to be invalid, the remainder of this order and other dissimilar applications of such provision shall not be affected.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,  
January 20, 2021.

**From:** [Fugh, Justina](#)  
**To:** [Marks, Matthew](#); [Srinivasan, Gautam](#)  
**Cc:** [Payne, James \(Jim\)](#); [Clarke, Victoria](#)  
**Subject:** RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary  
**Date:** Monday, January 25, 2021 4:43:33 PM

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Hi again,

First, I misspoke ... the person who sent the email at 2 am overnight wasn't Alexis but Winnie Okoye. I just checked my email (I misremembered the subject of the case).

Depending on when you plan to talk to her, you could tee up the issues with my general advice. I'm planning to send an email to her later tonight anyway.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

---

**From:** Marks, Matthew <Marks.Matthew@epa.gov>  
**Sent:** Monday, January 25, 2021 4:11 PM  
**To:** Fugh, Justina <Fugh.Justina@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>  
**Cc:** Payne, James (Jim) <payne.james@epa.gov>; Clarke, Victoria <clarke.victoria@epa.gov>  
**Subject:** RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Hi Justina,

In regards to your second response (b) (5)

[REDACTED]

Matt

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**Matthew C. Marks**

Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-3276  
E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Sent:** Monday, January 25, 2021 2:23 PM  
**To:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>  
**Cc:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>  
**Subject:** RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Hi Gautam,  
See my notes below:

- Even if Melissa is recused from a case, can we share with her publicly available information about it? I think the answer is yes.

JUSTINA: yes, you may share and she may hear publicly available information.

- (b) (5)
- [REDACTED]
- [REDACTED]
- [REDACTED]



(b) (5)

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>

**Sent:** Monday, January 25, 2021 1:37 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Thanks much. Final question/variant. Even if Melissa is recused from a case, can we share with her publicly available information about it? I think the answer is yes. (b) (5)

Sorry to get so granular.

+++++

(202) 564-5647 (o)

(202) 695-6287 (c)

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Monday, January 25, 2021 1:19 PM

**To:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>

**Cc:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Hi Gautam,

When Lisa Jackson became the EPA Administrator, she came to us from the State of New Jersey. At the time, there was a "little" case called State of New Jersey v. EPA, but we anticipated that the new Obama Administration would not want to pursue it in the Supreme Court. So the impartiality determination we wrote allowed her to make the policy decision to cease pursuing it *without ever discussing the merits of the case*. That's the same analysis we applied to the situation for Melissa except that, unlike Lisa Jackson, Melissa is an attorney subject to her own bar restrictions, notably 1.6 (duty of confidentiality), 1.9 (duty to former client) and 1.11 (obligations of former government officials). She cannot discuss the merits of any case in which she previously participated because of her bar obligations. But she can make a policy decision about whether or not to proceed with the litigation of that case.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>

**Sent:** Monday, January 25, 2021 12:58 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>



**Subject:** RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Thanks. And one other clarification, if you please. The impartiality letter says that Melissa can participate in “policy determinations related to these cases.” I had thought that meant Melissa could, say, participate in discussions about how EPA will regulated power plants, even if she is recused from the ACE litigation. But your email below says Melissa can participate in “policy decisions *about* that litigation” and lists a decision to stay as an example.

Assuming the formulation in your email is right, is there anything more you can provide on the scope of “policy decisions about” litigation? A question of whether to stay a case may involve discussion of the merits of the case. I’m unclear on how exactly to implement this aspect. Thanks again!

+++++

(202) 564-5647 (o)

(202) 695-6287 (c)

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Monday, January 25, 2021 12:47 PM

**To:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>

**Cc:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Hi Gautam,

Yes, please don’t send it to them.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>

**Sent:** Monday, January 25, 2021 12:46 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>

**Subject:** RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Hi Justina- Quick follow up on this. We have prepared a written summary/analysis of the ACE litigation (American Lung Association v. EPA). Both Massachusetts and NRDC were parties in the case. Given that, it seems like we should not be sending the summary to them. Do I have that right?

+++++

(202) 564-5647 (o)

(202) 695-6287 (c)

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Thursday, January 21, 2021 9:12 PM

**To:** OGC HQ ADDs <[OGC\\_HQ\\_ADDs@epa.gov](mailto:OGC_HQ_ADDs@epa.gov)>; OGC RCs and DRCs <[OGC\\_RCs\\_and\\_DRCs@epa.gov](mailto:OGC_RCs_and_DRCs@epa.gov)>

**Cc:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>; Chaudhary, Dimple <[Chaudhary.Dimple@epa.gov](mailto:Chaudhary.Dimple@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Griffo, Shannon <[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)>

**Subject:** an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Hi there,

As you might expect, the OGC/Ethics Office is cheerfully up to our eyeballs in ethics issues for our incoming appointees. Not only are we thinking, as we always do, about financial conflicts of interest, but we are also weighing impartiality concerns with former employers and former clients, bar obligations and now an executive order on ethics commitments. We will be drafting recusal statements, but we typically wait until after we have a chance to review the financial disclosure reports. As many of you also file that wretched report, you know how much work that entails. So, before we can distribute signed recusal statements, here’s how to navigate the likely recusal issues for Melissa Hoffer and Dimple Chaudhary.

MELISSA HOFFER

- Melissa is bound by her bar restrictions from sharing the confidences of her former client, the Commonwealth of Massachusetts, and from switching sides in litigation in which she previously

participated or for which she provided supervision. With the attached impartiality determination, however, I authorized her to participate in making policy decisions about that litigation, such as whether or not to stay the proceedings. That impartiality determination included the list of cases from which she is recused because of her bar obligations. For her tenure at EPA, she will be recused from participation in these cases.

- For now and continuing for one year, she is recused from participation in any new specific party matter in which Massachusetts is a party or represents a party. Should we issue another impartiality determination, I will share that with you.

#### DIMPLE CHAUDHARY

- Dimple is bound by her bar restrictions from sharing the confidences of her former client, the Natural Resources Defense Council, and from switching sides in litigation in which she previously participated or for which she provided supervision or counsel. The cases from which she is recused are:

CASE NAME and/or SUBJECT MATTER	CITATION and/or DESCRIPTION:
Consent Decree Implementation of Agency's failure to issue a worst-case spill regulation for non-transportation-related-substantial-harm facilities	<i>Environmental Justice Health Alliance for Chemical Policy Reform, NRDC, et al. v. EPA</i> , Case No. 19-cv-2516, SDNY
Challenge to Methylene chloride rule	<i>Labor Council for Latin America, NRDC, et al. v. EPA</i> , Case No. 19-1042, 2d Cir.
Challenge to use of tetrachlorvinphos on pets	<i>NRDC v. Wheeler</i> , Case No. 20-72794, 9th Cir.
Provided individual counseling to plaintiffs in Flint water crisis	<i>Walters v. Flint, EPA, et al.</i> , Case No. 17-10164, E.D. Mich.

- Because Dimple's former employer is not a state or local government, she is further bound by Section 2 of the Biden Ethics Pledge. We cannot grant impartiality determinations for her. Instead, for two years, she cannot participate in any specific party matter in which NRDC is a party or represents a party. She may not attend any meeting nor have any communication with NRDC unless the communication relates to a particular matter of general applicability and participation in the event is open to all interested parties. Dimple's recusal period with NRDC on any specific party matter (e.g., litigation, contracts, grants, speaking engagement) will last until after January 20, 2023.

If you have any questions about these general recusal areas, then please let me know.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

**From:** [Fugh, Justina](#)  
**To:** [Srinivasan, Gautam](#)  
**Cc:** [Clarke, Victoria](#); [Griffo, Shannon](#)  
**Subject:** FW: another recusal Q  
**Date:** Wednesday, February 24, 2021 4:05:03 PM  
**Attachments:** [enclosure to impartiality determination 1-19-21 updated 1-21-21.docx](#)

---

Hi,

Yes, the list referenced in the logic tree is the attached list (1/19/21, updated 1/21/21) and is to be used in Step 1. Step 2 applies to any other case not on the list, irrespective of when filed.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>  
**Sent:** Wednesday, February 24, 2021 3:58 PM  
**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>  
**Subject:** RE: another recusal Q

Another follow up question on my endless ethics quest. On the logic tree below, you reference “the list of cases from which Melissa is recused.” I think the only list of cases I’ve seen is the one that was attached to the first impartiality determination (attached). Is this the list of cases to use for step 1 (ie, it is the list of cases from which Melissa is recused)? If no, am I missing a list? If yes, does that mean step 2 is only relevant for cases filed after 1/19/21 (or 1-21-21)?

Thanks as always.

++++  
(202) 564-5647 (o)  
(202) 695-6287 (c)

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Sent:** Saturday, February 20, 2021 6:13 PM  
**To:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>  
**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>  
**Subject:** RE: another recusal Q

Alas, no. Ethics advice is always tied to the specific set of facts, and what you told me is that the lawsuit is new, arising after Melissa left Massachusetts. She is, however, still bound by her

bar rules. So if she worked on the case/brief/petition, the impartiality determination does not absolve her of her bar restriction. The determination we wrote allows her to work on specific party matters in which MA is a party or represents a party, but only if she did not previously work on that same specific party matter.

Let's revisit that logic tree I sent before, now modified to reflect the second impartiality determination:

1. Review the list of cases from which Melissa is recused
  - a. If the case is on her list, then do not discuss with her
  - b. If the case is not on the list, proceed to step 2.
2. Look to see if Massachusetts is a party or intervenor
  - a. If yes, then find out whether Melissa worked on the case/brief/petition prior to leaving MA
    - i. If yes, then do not discuss with her
  - b. If no, then you may discuss with her because OGC/Ethics issued the impartiality determination to permit her to work on NEW specific party matters with Massachusetts

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>

**Sent:** Saturday, February 20, 2021 5:41 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** Re: another recusal Q

Oh, the world of ethics! Forgive my linear thinking. So the impartiality determination acts as a sort of reset button (or clean slate), as it were? And that's true even if Melissa was personally involved in filing the complaint?

I hope the answer is yes as this greatly simplifies our lives! Thanks as always.

+++++

(202) 564-5647 (o)

(202) 695-6287 (c)

On Feb 20, 2021, at 5:21 PM, Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)> wrote:

Hi Gautam,

Well, the good news for you is that Melissa can work on the newly filed litigation. Now I need to explain to you why, and I've been mulling over how to do that. I think you were approaching the analysis from a strictly linear perspective using a litigation timeline: Melissa arrives at EPA → case filed by MA → impartiality determination written after case is filed so Melissa can't work on it.

But that's not the way we apply our ethics analysis. We don't care about the litigation timeline; instead, our analysis goes like this: Melissa arrives at EPA → case filed by MA → MA is her former employer so she can't work on the case → impartiality determination issued → Melissa can work on the case. See the difference? We just need that impartiality determination to predate *her personal and substantial participation* in the specific party matter, and it does.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>

**Sent:** Friday, February 19, 2021 4:36 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** another recusal Q

Hi there. I believe you issued a second impartiality determination for Melissa to allow her to work on newly filed litigation by MA. I assume the "effective date" of that determination was the date of issuance. I ask because we have a lawsuit to which MA is a party that was filed on January 12. (b) (5)

and maybe I'm not understanding the second impartiality determination in the first place)

Thanks as always.

+++++

(202) 564-5647 (o)

(202) 695-6287 (c)

<Impartiality determination for Massachusetts.pdf>

**From:** [Fugh, Justina](#)  
**To:** [Payne, James \(Jim\)](#); [Chaudhary, Dimple](#)  
**Cc:** [Srinivasan, Gautam](#); [Clarke, Victoria](#); [Marks, Matthew](#)  
**Subject:** RE: EG/OS for HFC Phasedown Rule under the AIM Act (SAN 8458)  
**Date:** Wednesday, February 10, 2021 11:38:57 PM

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Correct. Because this discussion focuses on a matter of general applicability, I don't see any recusal issues for Melissa (who, it must be remembered, has only impartiality issues with her former employer, not Biden pledge issues).

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>  
**Sent:** Wednesday, February 10, 2021 10:54 PM  
**To:** Chaudhary, Dimple <[Chaudhary.Dimple@epa.gov](mailto:Chaudhary.Dimple@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Subject:** Re: EG/OS for HFC Phasedown Rule under the AIM Act (SAN 8458)  
And Gautam and I touched base, and he confirmed that this is a rulemaking matter, so presumably no recusal issues other than as to any comments filed, unless hear otherwise from Justina.

Sent from my iPhone

On Feb 10, 2021, at 9:18 PM, Chaudhary, Dimple <[Chaudhary.Dimple@epa.gov](mailto:Chaudhary.Dimple@epa.gov)> wrote:

Thanks, all.

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**From:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>  
**Sent:** Wednesday, February 10, 2021 9:16 PM  
**To:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>  
**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Chaudhary, Dimple <[Chaudhary.Dimple@epa.gov](mailto:Chaudhary.Dimple@epa.gov)>  
**Subject:** Re: EG/OS for HFC Phasedown Rule under the AIM Act (SAN 8458)  
FYI, there is no litigation associated with the AIM Act, nor is there any ongoing rulemaking.

++++  
(202) 564-5647 (o)  
(202) 695-6287 (c)

On Feb 10, 2021, at 9:00 PM, Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>

wrote:

Pls advise of any recusal for Melissa for this Options Selection meeting for a CAA rulemaking, other than being recused as to any rulemaking comments she might have filed.

Sent from my iPhone

On Feb 10, 2021, at 3:23 PM, Chaudhary, Dimple  
<[Chaudhary.Dimple@epa.gov](mailto:Chaudhary.Dimple@epa.gov)> wrote:

Jim – Can you remind me if Melissa is screened from this case?

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**From:** Schillo, Bruce <[Schillo.Bruce@epa.gov](mailto:Schillo.Bruce@epa.gov)>  
**Sent:** Wednesday, February 10, 2021 3:19 PM  
**To:** Hall-Jordan, Luke <[Hall-Jordan.Luke@epa.gov](mailto:Hall-Jordan.Luke@epa.gov)>; Chang, Wei-An (Andy) <[Chang.Andy@epa.gov](mailto:Chang.Andy@epa.gov)>; Sheppard, Margaret <[Sheppard.Margaret@epa.gov](mailto:Sheppard.Margaret@epa.gov)>  
**Cc:** Williams, Melina <[Williams.Melina@epa.gov](mailto:Williams.Melina@epa.gov)>; Bianco, Karen <[Bianco.Karen@epa.gov](mailto:Bianco.Karen@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Chaudhary, Dimple <[Chaudhary.Dimple@epa.gov](mailto:Chaudhary.Dimple@epa.gov)>; Griffiths, Charles <[Griffiths.Charles@epa.gov](mailto:Griffiths.Charles@epa.gov)>; Smith, David <[Smith.David@epa.gov](mailto:Smith.David@epa.gov)>  
**Subject:** EG/OS for HFC Phasedown Rule under the AIM Act (SAN 8458)

The Option Selection meeting is scheduled for next Wednesday, 2/17. (b) (5)

[REDACTED]



**From:** [Neugeboren, Steven](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Stein, Mark](#); [Dierker, Carl](#); [Levine, MaryEllen](#); [OGC WLO MGMT](#); [Clarke, Victoria](#)  
**Subject:** Re: ethics next step - for immediate attention  
**Date:** Wednesday, January 27, 2021 11:00:09 PM

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Thank you Justina! Copying him for his information.

We won't discuss at hot issues tomorrow

Steven Neugeboren  
Associate General Counsel for Water  
Environmental Protection Agency  
Mails code 2355A  
1200 Pennsylvania Ave, NW  
Washington DC 20460  
202-564-5488

On Jan 27, 2021, at 10:54 PM, Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)> wrote:

Hi,

Under the federal ethics regulations alone, Melissa has no problem because the impartiality regulations care only about an employee's former employer in the preceding year. Melissa has not worked for CLF since September 2012. So this boils down to a bar issue, and I don't give bar advice. I hint and I nudge, but I can't give definitive bar advice.

Although Melissa was not a government attorney when she represented CLF, she is now a federal government attorney so we can look at MA rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees. For this analysis, we disregard her MA government service and focus on applying rule 1.11(d) for a lawyer "currently serving as a public officer or employee." She is, of course, subject to rules 1.7 and 1.9 (preserving client confidentiality) and "shall not ... participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing." A comment to the MA rule says that she would not be prohibited from "jointly representing a private party and a government agency" when permitted by rule 1.7 and otherwise not prohibited by law.

Theoretically, (b) (5)

[REDACTED]

Justina

Justina Fugh | Director Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North William Jefferson Clinton Federal Building | Washington DC 20460 (for ground deliveries use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Stein, Mark <[Stein.Mark@epa.gov](mailto:Stein.Mark@epa.gov)>  
**Sent:** Tuesday, January 26, 2021 3:22 PM  
**To:** Dierker, Carl <[Dierker.Carl@epa.gov](mailto:Dierker.Carl@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>; Levine, MaryEllen <[levine.maryellen@epa.gov](mailto:levine.maryellen@epa.gov)>  
**Cc:** OGC WLO MGMT <[OGC\\_WLO\\_MGMT@epa.gov](mailto:OGC_WLO_MGMT@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>  
**Subject:** RE: ethics next step - for immediate attention  
Hi Justina –

In 1992, Region 1 issued an NPDES permit to Merrimack Station, a power plant in Bow, NH. The next iteration of the permit is now under appeal. Region 1 issued the Draft Permit in 2011. Then a Revised Draft Permit in 2014 (due to changes at the power plant). Then reopened the comment period again in 2017, due to multiple changes in applicable regulations. Additional delays occurred due to responding to the comments, new ownership of the facility, changing policies of the last Administration and court decisions altering the applicable regulations yet again. Region 1 finally issued the Final Permit in May, 2020.

Melissa worked with CLF in New Hampshire in the time-frame of the 2011 Draft Permit and, I think (b) (5)

(b) (5)

Anyway, CLF continued to comment in our permit proceeding and after we issued the Final Permit in May 2020, CLF joined Sierra Club in challenging parts of the permit in an appeal to EPA's Environmental Appeals Board. That appeal is now pending.

I hope that helps. (b) (5)

Thanks.

- Mark

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**From:** Dierker, Carl <[Dierker.Carl@epa.gov](mailto:Dierker.Carl@epa.gov)>

**Sent:** Tuesday, January 26, 2021 3:08 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>; Levine, MaryEllen <[levine.maryellen@epa.gov](mailto:levine.maryellen@epa.gov)>; Stein, Mark <[Stein.Mark@epa.gov](mailto:Stein.Mark@epa.gov)>

**Cc:** OGC WLO MGMT <[OGC\\_WLO\\_MGMT@epa.gov](mailto:OGC_WLO_MGMT@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** RE: ethics next step - for immediate attention

Bringing Mark into the loop, as he probably has the best knowledge of CLF's role in developing and appealing the current NPDES permit.

---

**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Tuesday, January 26, 2021 2:39 PM

**To:** Levine, MaryEllen <[levine.maryellen@epa.gov](mailto:levine.maryellen@epa.gov)>

**Cc:** OGC WLO MGMT <[OGC\\_WLO\\_MGMT@epa.gov](mailto:OGC_WLO_MGMT@epa.gov)>; Dierker, Carl <[Dierker.Carl@epa.gov](mailto:Dierker.Carl@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** RE: ethics next step - for immediate attention

Hi,

I don't have a federal ethics dog in this fight. This is likely a professional responsibility issue for Melissa under her bar rules. But can you explain more about the situation? What does she mean she "worked on" it while at CLF? Isn't the permit issued between EPA and Merrimack Station? How might CLF be involved? Did they comment on the permit in some way? Has the permit been revised at all over the years, or is the EAB litigation about the very same permit?

Justina

Justina Fugh | Director Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North William Jefferson Clinton Federal Building | Washington DC 20460 (for ground deliveries use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Levine, MaryEllen <[levine.maryellen@epa.gov](mailto:levine.maryellen@epa.gov)>

**Sent:** Tuesday, January 26, 2021 1:59 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** OGC WLO MGMT <[OGC\\_WLO\\_MGMT@epa.gov](mailto:OGC_WLO_MGMT@epa.gov)>; Dierker, Carl <[Dierker.Carl@epa.gov](mailto:Dierker.Carl@epa.gov)>

**Subject:** FW: ethics next step - for immediate attention

Justina,

We are defending a permit for Merrimack Station before the EAB. Melissa mentioned she worked on the permit for Conservation Law Foundation, before her job at the Mass AG's office. CLF is challenging the permit – they are opposing counsel.

Are there any recusal issues we should be aware of?

• **Mary Ellen**

Mary Ellen Levine

Assistant General Counsel

Water Law Office, Office of General Counsel

7510 C WJC North

(202) 564-1345

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**From:** Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>

**Sent:** Monday, January 25, 2021 7:32 PM

**To:** Levine, MaryEllen <[levine.maryellen@epa.gov](mailto:levine.maryellen@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto:Messier.Dawn@epa.gov)>; McConkey, Diane <[Mcconkey.Diane@epa.gov](mailto:Mcconkey.Diane@epa.gov)>; Wehling, Carrie <[Wehling.Carrie@epa.gov](mailto:Wehling.Carrie@epa.gov)>

**Subject:** Re: ethics next step - for immediate attention

I can't imagine there's a lifetime ban. You could check with Justina.

Steven Neugeboren  
Associate General Counsel for Water  
Environmental Protection Agency  
Mails code 2355A  
1200 Pennsylvania Ave, NW  
Washington DC 20460  
202-564-5488

On Jan 25, 2021, at 6:16 PM, Levine, MaryEllen <[levine.maryellen@epa.gov](mailto:levine.maryellen@epa.gov)> wrote:

I understand from ORC 1 that for CLF, Melissa worked on the Merrimack permit around 2012

- **Mary Ellen**

Mary Ellen Levine  
Assistant General Counsel  
Water Law Office, Office of General Counsel  
7510 C WJC North  
(202) 564-1345

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**From:** Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>

**Sent:** Monday, January 25, 2021 5:42 PM

**To:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto:Messier.Dawn@epa.gov)>; Levine, MaryEllen <[levine.maryellen@epa.gov](mailto:levine.maryellen@epa.gov)>; McConkey, Diane <[Mcconkey.Diane@epa.gov](mailto:Mcconkey.Diane@epa.gov)>; Wehling, Carrie <[Wehling.Carrie@epa.gov](mailto:Wehling.Carrie@epa.gov)>

**Subject:** ethics next step - for immediate attention

Sharing Justina's response below which is complicated, so I called her and it and her message seemed orally pretty simple – that likely they CAN participate in any cases to which their prior employer was not a party. To help reach closure we agreed I would send her a list of the cases challenging the wotus and 401 rules to which their prior employers are not parties, and she would then forward that to melissa and dimple with her advice (I will review the email prior to its going to them).

So here is next steps:

**Carrie and Diane** – can you each have someone send me at their earliest convenience those case lists I can then forward to Justina – i.e., for each of them the WOTUS and 401 cases to which their prior employers are not a party. Please also list the case where Mass has filed amicus.

Thanks and let me know if you have any questions.

Steven Neugeboren  
Associate General Counsel for Water  
United States Environmental Protection Agency  
Mailcode 2355A  
1200 Penn. Ave., N.W.  
Washington DC 20460  
(202) 564-5488

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Monday, January 25, 2021 2:14 PM

**To:** Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>

**Cc:** Wehling, Carrie <[Wehling.Carrie@epa.gov](mailto:Wehling.Carrie@epa.gov)>; Messier, Dawn <[Messier.Dawn@epa.gov](mailto:Messier.Dawn@epa.gov)>

**Subject:** RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Hi Steve, Carrie and Dawn,

Often, I find it useful to just insert comments into the email itself, so see my comments in red below.

Justina

As discussed, there is pending litigation in about 12 district courts challenging the WOTUS rule, and Massachusetts is a party to cases in California, New York and has filed an amicus brief in Massachusetts. NRDC is a party to cases in Massachusetts and So. Carolina. We discussed restrictions for them across the different cases and I've tried to capture what I took away from our conversation so can you please provide confirmation or clarification/correction.

JUSTINA: To put the inquiry into our ethics vocabulary, these 12 cases are *particular matters involving specific parties*, also known as *specific party matters*. For our purposes, it doesn't matter that the subject matter of the specific party matter is a rulemaking, which is itself not a specific party matter. For ethics purposes, we focus on the "thing" at issue, which in this situation are those 12 separate cases.

I'd like to ensure we understand the restrictions as soon as we are able as we are starting to prepare Monday for our first hot issues meeting with Melissa and Dimple this week. Thanks!

**Melissa:**

As explained in your email below, under her bar obligations, Melissa is precluded during her EPA tenure from participation in the two WOTUS cases to which Mass. is a party. In our call you explained that the "policy" decisions she may participate in pursuant to your impartiality determination include, for example, a policy decision not to defend the rule in litigation and requesting DOJ to seek abeyances in the cases for the Agency to reconsider its policy options. Your impartiality determination does not, however, permit her to participate in discussions of the litigation itself – e.g., deliberations on litigation strategy in light of such a policy decision, such as discussion whether to seek a remand, or other litigation options.

Question - Do the restrictions as you describe them apply to a case in which Mass. has participated as amicus in D.Mass?

JUSTINA: Assuming that MA was not a party to the case itself but filed an *amicus* brief only, then MA is not actually a party to the case. If the brief is filed by MA after she left the AG's office, then under the federal ethics rules ONLY, she might be permitted to work on it provided I grant an impartiality determination to allow her to work with MA during her one year cooling off period under the impartiality regulations. But if Melissa worked on that *amicus* brief filing or if the case is similar to the MA cases she worked on, then she may have bar restrictions. Remember, she must always preserve her former clients secrets and abide by rule 1.11 that preclude the former government official from "switching sides" on the same specific party matter. In some jurisdiction, the bar refers to the "same or *substantially related* specific party matter," which is not a term that arises in federal ethics. We refer attorneys to their own bar counsel for clarification.

With regard to the WOTUS cases to which Mass. is **not** a party, you discussed the question under the federal ethics rules and Melissa's bar restrictions (as she is not subject to the Biden ethics pledge since she is from a state).

JUSTINA: Right. Melissa's federal ethics obligations are found in the rules about loss of impartiality at 5 CFR 2635.502(b)(1)(iv): for one year after leaving MA, she cannot work on any particular matter in which her former employer or client (MA) is a party or represents a party unless she first obtains a written impartiality determination from OGC/Ethics. Because her former employer/client is a state, she is not subject to the additional restriction period under the Biden ethics pledge. And she remains subject to her bar rules.

Under the federal ethics rules, you indicated that Melissa may participate in such cases, notwithstanding the similar nature of those cases to the ones Mass is a party to in terms of the rules being challenged and the legal issues in the case, but you may advise her, as a prudential matter, to get the consent of her former employer before doing so.

JUSTINA: Yep. The federal ethics rules in this regard are in place to ensure that a new employee's loyalty is to the US government, not to the former employer. That's why we want a "cooling off" period. That said, we understand that it may be in the Agency's interest to have our new employee interact directly with the former employer, so the federal ethics rules allow for an ethics official to consider the impartiality factors at 5 CFR 2635.502(d)(1)-(6) to nevertheless allow the new employee to do so. The complicating factor for lawyers are their bar rules that preclude switching sides. Unlike the DC Bar, the MA bar rule 1.11 permits the former attorney to obtain the "informed consent" of the former client. We don't provide bar advice, so we urge attorneys to consult bar counsel on their own.

Under her bar restrictions, I believe you said that she may be able to participate in those cases if she received the consent of her former employer, but you were going to check the relevant bar rules. I wasn't sure which state bar rules you would need to check (it seemed like the location of the case was relevant – the first paragraph above lists the jurisdictions of the cases to which Mass is a party and filed an amicus brief).

JUSTINA: She will always be obliged to adhere to her own bar rules. If a case is in federal court, then she may have to abide by the bar rules in that jurisdiction as those rules may apply. The rules in question are always the duty of loyalty to the former client and that pesky rule about former government officials at 1.11. Remember, in DC, our rule 1.11 does not allow for any informed consent.

**Dimple**

I don't have notes of discussion of the federal ethics rules, but I assume the answer for Dimple is the same as above for Melissa – she may participate in WOTUS cases to which NRDC is not a party (subject to a potentially your prudential advice to obtain the consent of her former employer).

JUSTINA: What I said about Dimple is that, because she is subject to the Biden ethics pledge, her

federal ethics rules are subsumed. The Biden pledge makes us look back two years (not just one), starts the recusal clock when she starts at EPA (not when she last provided the service), and the cooling off period lasts for two years (not just one).

Under her bar restrictions, since no WOTUS cases are listed for below, I think you said they do not restrict her participate in those cases.

JUSTINA: Correct, so long as NRDC is not a party to that litigation.

However, per your email, under the Biden ethics pledge she may not participate in any of the WOTUS cases to which NRDC is party for two years.

JUSTINA: Correct, she can't work on any specific party matter in which NRDC is a party or represents a party. And the Biden pledge further says that she can't attend any meeting or engage in any communication with NRDC as part of her official duties unless the subject matter of the meeting a particular matter of general applicability AND the meeting itself is "open to all interested parties," which we interpret as at least 5 entities representing diverse interests.

I hope this helps, but I know that ethics issues (particularly when overlaid with an additional ethics pledge and bar restrictions) are not necessarily intuitive. So let us know if you need more clarification!

Justina

Justina Fugh | Director Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308  
North William Jefferson Clinton Federal Building | Washington DC 20460 (for ground deliveries use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>

**Sent:** Saturday, January 23, 2021 3:02 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Wehling, Carrie <[Wehling.Carrie@epa.gov](mailto:Wehling.Carrie@epa.gov)>; Messier, Dawn <[Messier.Dawn@epa.gov](mailto:Messier.Dawn@epa.gov)>

**Subject:** RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Justina- thanks for the conversation yesterday about some of the circumstances we are dealing with in water for WOTUS cases. As discussed, there is pending litigation in about 12 district courts challenging the WOTUS rule, and Massachusetts is a party to cases in California, New York and has filed an amicus brief in Massachusetts. NRDC is a party to cases in Massachusetts and So. Carolina. We discussed restrictions for them across the different cases and I've tried to capture what I took away from our conversation so can you please provide confirmation or clarification/correction.

I'd like to ensure we understand the restrictions as soon as we are able as we are starting to prepare Monday for our first hot issues meeting with Melissa and Dimple this week. Thanks!

**Melissa:**

As explained in your email below, under her bar obligations, Melissa is precluded during her EPA tenure from participation in the two WOTUS cases to which Mass. is a party. In our call you explained that the "policy" decisions she may participate in pursuant to your impartiality determination include, for example, a policy decision not to defend the rule in litigation and requesting DOJ to seek abeyances in the cases for the Agency to reconsider its policy options. Your impartiality determination does not, however, permit her to participate in discussions of the litigation itself – e.g., deliberations on litigation strategy in light of such a policy decision, such as discussion whether to seek a remand, or other litigation options.

Question - Do the restrictions as you describe them apply to a case in which Mass. has participated as amicus in D.Mass?

With regard to the WOTUS cases to which Mass. is **not** a party, you discussed the question under the federal ethics rules and Melissa's bar restrictions (as she is not subject to the Biden ethics pledge since she is from a state).

Under the federal ethics rules, you indicated that Melissa may participate in such cases, notwithstanding the similar nature of those cases to the ones Mass is a party to in terms of the rules being challenged and the legal issues in the case, but you may advise her, as a prudential matter, to get the consent of her former employer before doing so.

Under her bar restrictions, I believe you said that she may be able to participate in those cases if she received the consent of her former employer, but you were going to check the relevant bar rules. I wasn't sure which state bar rules you would need to check (it seemed like the location of the case was relevant – the first paragraph above lists the jurisdictions of the cases to which Mass is a party and filed an amicus brief).

**Dimple**

I don't have notes of discussion of the federal ethics rules, but I assume the answer for Dimple is the same as above for Melissa – she may participate in WOTUS cases to which NRDC is not a party (subject to a potentially your prudential advice to obtain the consent of her former employer).

Under her bar restrictions, since no WOTUS cases are listed for below, I think you said they do not restrict her participate in those cases.

However, per your email, under the Biden ethics pledge she may not participate in any of the WOTUS cases to which NRDC is party for two years.

Thanks so much for your help!

Steven Neugeboren

Associate General Counsel for Water

United States Environmental Protection Agency

Maildcode 2355A

1200 Penn. Ave., N.W.

Washington DC 20460

(202) 564-5488

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Thursday, January 21, 2021 9:12 PM

**To:** OGC HQ ADDs <[OGC\\_HQ\\_ADDs@epa.gov](mailto:OGC_HQ_ADDs@epa.gov)>; OGC RCs and DRCs <[OGC\\_RCs\\_and\\_DRCs@epa.gov](mailto:OGC_RCs_and_DRCs@epa.gov)>

**Cc:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>; Chaudhary, Dimple <[Chaudhary.Dimple@epa.gov](mailto:Chaudhary.Dimple@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Griffo, Shannon <[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)>

**Subject:** an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Hi there,

As you might expect, the OGC/Ethics Office is cheerfully up to our eyeballs in ethics issues for our incoming appointees. Not only are we thinking, as we always do, about financial conflicts of interest, but we are also weighing impartiality concerns with former employers and former clients, bar obligations and now an executive order on ethics commitments. We will be drafting recusal statements, but we typically wait until after we have a chance to review the financial disclosure reports. As many of you also file that wretched report, you know how much work that entails. So, before we can distribute signed recusal statements, here's how to navigate the likely recusal issues for Melissa Hoffer and Dimple Chaudhary.

MELISSA HOFFER

- Melissa is bound by her bar restrictions from sharing the confidences of her former client, the Commonwealth of Massachusetts, and from switching sides in litigation in which she previously participated or for which she provided supervision. With the attached impartiality determination, however, I authorized her to participate in making policy decisions about that litigation, such as whether or not to stay the proceedings. That impartiality determination included the list of cases from which she is recused because of her bar obligations. For her tenure at EPA, she will be recused from participation in these cases.
- For now and continuing for one year, she is recused from participation in any new specific party matter in which Massachusetts is a party or represents a party. Should we issue another impartiality determination, I will share that with you.

DIMPLE CHAUDHARY

- Dimple is bound by her bar restrictions from sharing the confidences of her former client, the Natural Resources Defense Council, and from switching sides in litigation in which she previously participated or for which she provided supervision or counsel. The cases from which she is recused are:

CASE NAME and/or SUBJECT MATTER	CITATION and/or DESCRIPTION:
Consent Decree Implementation of Agency's failure to issue a worst-case spill regulation for non-transportation-related-substantial-harm facilities	<i>Environmental Justice Health Alliance for Chemical Policy Reform, NRDC, et al. v. EPA</i> , Case No. 19-cv-2516, SDNY
Challenge to Methylene chloride rule	<i>Labor Council for Latin America, NRDC, et al. v. EPA</i> , Case No. 19-1042, 2d Cir.
Challenge to use of tetrachlorvinphos on pets	<i>NRDC v. Wheeler</i> , Case No. 20-72794, 9th Cir.
Provided individual counseling to plaintiffs in Flint water crisis	<i>Walters v. Flint, EPA, et al.</i> , Case No. 17-10164, E.D. Mich.

- Because Dimple's former employer is not a state or local government, she is further bound by Section 2 of the Biden Ethics Pledge. We cannot grant impartiality determinations for her. Instead, for two years, she cannot participate in any specific party matter in which NRDC is a party or represents a party. She may not attend any meeting nor have any communication

with NRDC unless the communication relates to a particular matter of general applicability and participation in the event is open to all interested parties. Dimple's recusal period with NRDC on any specific party matter (e.g., litigation, contracts, grants, speaking engagement) will last until after January 20, 2023.

If you have any questions about these general recusal areas, then please let me know.

Justina

Justina Fugh | Director Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308  
North William Jefferson Clinton Federal Building | Washington DC 20460 (for ground deliveries use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

**From:** [Payne, James \(Jim\)](#)  
**To:** [Bradley Campbell](#); [Chaudhary, Dimple](#)  
**Cc:** [\(b\) \(6\)@CLF.org](#); [Dierker, Carl](#); [Fugh, Justina](#); [Messier, Dawn](#)  
**Subject:** Re: Exigent Issue / Follow-up  
**Date:** Monday, March 29, 2021 8:14:09 PM

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And in any event, adding Dimple Chaudhary as she has been managing this matter for OGC.

Sent from my iPhone

On Mar 29, 2021, at 4:53 PM, Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)> wrote:

Hi there,

My name is Justina Fugh, and I am the director of the EPA Ethics Office. My staff and I work for Jim Payne, copied here. As you know, Melissa Hoffer is the Acting General Counsel here at EPA. For federal ethics purposes, we focus on her immediate past employer, the Commonwealth of Massachusetts, but we understand that she had previously worked for your organization, the Conservation Law Foundation (CLF). While employed by CLF, she indicates worked on an NPDES permit issue related to the Merrimack Station, located in New Hampshire and, at the time, was a member of the New Hampshire bar.

I looked at New Hampshire bar rule 1.9 that addresses the lawyer's duty to her former client and, although I cannot give authoritative bar advice, I recommended that Ms. Hoffer not participate unless and until she first obtained informed consent from her former client, in writing. See highlighted portion of the relevant rule below:

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

Rule 1.9. Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and



(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

In order for Ms. Hoffer to participate personally and substantially in this Merrimack issue, CLF will need to send to EPA a letter that clearly establishes your informed consent to permit her to do so. If you have any questions, please don't hesitate to contact me.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Payne, James (Jim) <payne.james@epa.gov>

**Sent:** Monday, March 29, 2021 3:55 PM

**To:** Bradley Campbell <(b) (6)@clf.org>

**Cc:** (b) (6)@CLF.org; Dierker, Carl <Dierker.Carl@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>

**Subject:** RE: Exigent Issue / Follow-up

Hi. I'm available to confer. Jim Payne, (b) (6) cell

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**From:** Bradley Campbell <(b) (6)@clf.org>

**Sent:** Monday, March 29, 2021 2:28 PM

**To:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>

**Cc:** (b) (6)@CLF.org; Payne, James (Jim) <payne.james@epa.gov>

**Subject:** Re: Exigent Issue / Follow-up

Thank you, Melissa. We are happy to waive the conflict and happy to follow up with Jim.

Sent from my iPad

On Mar 29, 2021, at 14:18, Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)> wrote:

CAUTION: Email from outside CLF.

Hi Brad and Tom,

As Tom may recall, I worked extensively on the Merrimack NPDES while I was employed by CLF. Having reviewed the applicable NH ethical requirements, I am conflicted from this matter absent a waiver from CLF.

In the interest of time, I have copied here my colleague Jim Payne would can follow up with you directly.

Thanks,  
Melissa

Sent from my iPhone

On Mar 25, 2021, at 3:09 PM, Bradley Campbell  
<(b) (6)@clf.org> wrote:

Dear Melissa:

Congratulations on your new post — what a godsend for environmental protection. And thank you for your timely response to my call.

You probably have some recollection of Merrimack Station in New Hampshire, one of the two coal plants left in New England. Merrimack still uses once-through cooling, and late in the Obama Administration Region 1 issued a draft permit that would have required cooling towers to avert the significant harm the plant's discharges are causing to the Merrimack River and its living resources. The cost of the towers is almost certainly prohibitive for continued operation of the plant.

EPA staff have indicated that Region I has apparently made the decision *not* to revisit/revise the Trump EPA's decision in the Merrimack Station NPDES permit to not require cooling towers (though it's considering a minor amendment related to leachate). Notably, Eversource divested the plant while the Obama draft permit was pending, so EPA's retreat from cooling tower requirement would essentially create a windfall with the new owner at the expense of the river and its living resources. **We have been told the final permit will issue soon.**

I think it would be unfortunate if the Biden Administration were to retreat from the position struck by the Obama EPA and give new life to this coal plant, and I'd hate to have our first advocacy concerning a Biden Administration permit decision be at all negative .

We would love to make the case to you or the appropriate EPA official that the anticipated decision to adopt the Trump Administration's position on cooling towers would be arbitrary, capricious, and contrary to law. Feel free to call me for TOM for additional information.

[N.B. CLF and Sierra Club have a pending Clean Water Act citizen suit (EPA is not a party) to address the plant's violations of its current permit]

Brad

**Bradley M. Campbell**  
President  
Conservation Law Foundation

62 Summer Street  
Boston, MA 02110

P: 617-850-1786

E: (b) (6) [@clf.org](mailto:(b) (6)@clf.org)

For a thriving New England



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#### CONFIDENTIALITY NOTICE

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**From:** [Fugh, Justina](#)  
**To:** [Green, Noelle](#)  
**Cc:** [Clarke, Victoria](#)  
**Subject:** RE: Follow up: CCILO comments on draft Science Transparency Rule  
**Date:** Friday, March 05, 2021 10:38:47 AM

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Thanks! I'm looking for allies! From an ethics perspective, each of the OGC political appointees presents a different recusal picture so the nuances matter. Because they can't assume that what applies to one of them applies to all, we want them to consult with us individually. As you can see from the email, Melissa did in fact copy me, but if you can help cut Marianne off at the pass ("oh, would you like us to contact ethics for you?"), that will always help!

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

---

**From:** Green, Noelle <[Green.Noelle@epa.gov](mailto:Green.Noelle@epa.gov)>

**Sent:** Friday, March 05, 2021 10:35 AM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** RE: Follow up: CCILO comments on draft Science Transparency Rule

Ah, gotcha! I was just echoing what Marianne identified as her own To-Dos at that day's Reg Review. My assumption was that Melissa would know if she's recused and if she didn't, she'd come to you all. But I'll be more explicit going forward.

Thanks,

*Noelle Green*

Attorney-Advisor

Cross-Cutting Issues Law Office

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, Northwest

Washington, DC 20460

(202) 564-1236

[green.noelle@epa.gov](mailto:green.noelle@epa.gov)

---

**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Friday, March 05, 2021 10:32 AM

**To:** Green, Noelle <[Green.Noelle@epa.gov](mailto:Green.Noelle@epa.gov)>

**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** RE: Follow up: CCILO comments on draft Science Transparency Rule

Oh, at the bottom of this email trail, I saw you wrote:

Per your request, please see attached for the comments CCILO provided to ORD on the draft Science Transparency Vacatur Rule and related options selection paper. Please note I am not sending to the entire FO group given that Marianne was going to check with Melissa to confirm that she is not recused from the matter before providing her with our comments.

I didn't mean to imply that you were giving any ethics advice! Rather, I'm asking you to help point the deputies to OGC/ethics instead.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Green, Noelle <[Green.Noelle@epa.gov](mailto:Green.Noelle@epa.gov)>

**Sent:** Friday, March 05, 2021 10:29 AM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** RE: Follow up: CCILO comments on draft Science Transparency Rule

Will do, but may I ask what prompted this email? I didn't give any recusal advice to anyone, nor would I.

*Noelle Green*

Attorney-Advisor

Cross-Cutting Issues Law Office

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, Northwest

Washington, DC 20460

(202) 564-1236

[green.noelle@epa.gov](mailto:green.noelle@epa.gov)

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Friday, March 05, 2021 10:21 AM

**To:** Green, Noelle <[Green.Noelle@epa.gov](mailto:Green.Noelle@epa.gov)>

**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** FW: Follow up: CCILO comments on draft Science Transparency Rule

Hey Noelle,

Until the political appointees finalize their recusal statements (necessarily delayed as they work on their financial disclosure reports, which are way more detailed than the confidential reports our staff attorneys complete), please direct any questions about recusals to OGC/Ethics. You can write to Victoria, me or even [ethics@epa.gov](mailto:ethics@epa.gov). We'll respond quickly and more efficiently. We frown on situations in which the appointee herself or a non-ethics person attempts to make decisions about recusals.

Thanks,

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Fugh, Justina

**Sent:** Friday, March 05, 2021 10:15 AM

**To:** Engelman-Lado, Marianne <[EngelmanLado.Marianne@epa.gov](mailto:EngelmanLado.Marianne@epa.gov)>; Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>

**Cc:** Packard, Elise <[Packard.Elise@epa.gov](mailto:Packard.Elise@epa.gov)>

**Subject:** RE: Follow up: CCILO comments on draft Science Transparency Rule

Hi,

I wasn't asked by CCILO about Melissa's participation, and I haven't seen the document that Noelle referenced. What I can do going forward, though, is to remind our friends in CCILO that they may ask OGC/Ethics directly about recusal issues rather than rely on you, Marianne, to ask Melissa yourself. There are so many nuances in individual recusals that we strongly recommend asking us rather than the individual.

That said, Melissa's understanding of her recusal obligations is correct: she is recused from specific party matters in which she formerly participated but not from working on matters of general applicability, such as rulemaking or policy matters.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Engelman-Lado, Marianne <[EngelmanLado.Marianne@epa.gov](mailto:EngelmanLado.Marianne@epa.gov)>

**Sent:** Friday, March 05, 2021 10:09 AM

**To:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>

**Cc:** Packard, Elise <[Packard.Elise@epa.gov](mailto:Packard.Elise@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** RE: Follow up: CCILO comments on draft Science Transparency Rule

Justina, should we wait to hear back from you on this?

Otherwise, Melissa, I can let the team know that we're waiting to clarify whether you're recused and Elise and I can carry the ball until then.

Best,

Marianne

---

**From:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>

**Sent:** Friday, March 5, 2021 9:56 AM

**To:** Engelman-Lado, Marianne <[EngelmanLado.Marianne@epa.gov](mailto:EngelmanLado.Marianne@epa.gov)>

**Cc:** Packard, Elise <[Packard.Elise@epa.gov](mailto:Packard.Elise@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** RE: Follow up: CCILO comments on draft Science Transparency Rule

My understanding is that I may **\*not\*** engage matters related to the litigation, but am able to engage policy considerations, e.g., a subsequent rulemaking, etc.

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**From:** Engelman-Lado, Marianne <[EngelmanLado.Marianne@epa.gov](mailto:EngelmanLado.Marianne@epa.gov)>

**Sent:** Thursday, March 4, 2021 11:58 AM

**To:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>

**Cc:** Packard, Elise <[Packard.Elise@epa.gov](mailto:Packard.Elise@epa.gov)>

**Subject:** Follow up: CCILO comments on draft Science Transparency Rule

Melissa,

This is another follow up to the CCILO meeting yesterday. There wasn't clarity about whether you are recused from the rule, as opposed to the litigation and/or whether Elise or I should play a role.

Thanks,

Marianne

---

**From:** Green, Noelle <[Green.Noelle@epa.gov](mailto:Green.Noelle@epa.gov)>

**Sent:** Thursday, March 4, 2021 11:54 AM

**To:** Packard, Elise <[Packard.Elise@epa.gov](mailto:Packard.Elise@epa.gov)>; Engelman-Lado, Marianne  
<[EngelmanLado.Marianne@epa.gov](mailto:EngelmanLado.Marianne@epa.gov)>

**Cc:** Simons, Andrew <[Simons.Andrew@epa.gov](mailto:Simons.Andrew@epa.gov)>; Sheppard, Tracy <[Sheppard.Tracy@epa.gov](mailto:Sheppard.Tracy@epa.gov)>;  
Serassio, Helen <[Serassio.Helen@epa.gov](mailto:Serassio.Helen@epa.gov)>

**Subject:** CCILO comments on

Elise and Marianne,

Per your request, please see attached for the comments CCILO provided to ORD on the draft Science Transparency Vacatur Rule and related options selection paper. Please note I am not sending to the entire FO group given that Marianne was going to check with Melissa to confirm that she is not recused from the matter before providing her with our comments.

Thank you,

*Noelle Green*

Attorney-Advisor

Cross-Cutting Issues Law Office

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, Northwest

Washington, DC 20460

(202) 564-1236

[green.noelle@epa.gov](mailto:green.noelle@epa.gov)



**From:** [Fugh, Justina](#)  
**To:** [Cole, Joseph E.](#); [Clarke, Victoria](#)  
**Subject:** RE: HEADS UP - FW: NEW Litigation TSCA 1,4-Dioxane Risk Evaluation  
**Date:** Wednesday, March 24, 2021 8:30:11 PM

---

Hi Joe,

No, we hadn't heard from Jim that he wanted us to ask, but we will do so. I will refrain from further comment.

Re: (b) (6)

Justina

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**From:** Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>  
**Sent:** Wednesday, March 24, 2021 7:26 PM  
**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>  
**Subject:** RE: HEADS UP - FW: NEW Litigation TSCA 1,4-Dioxane Risk Evaluation

Justina,

I talked to Jim about this today and not sure if he followed up with you or not. I'm trying to see how best to learn whether Melissa worked on this case. If I'm getting it right, Jim seemed to think that this might be better for your office to find out from Melissa. If that's not the case, let me know and I'll be happy to raise with Jim for discussion with Melissa. Sorry to be such a "frequent flyer!" How's Donovan (or does he have a different name?)?

Joe

Joseph E. Cole  
Associate General Counsel  
Pesticides and Toxic Substances Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
(202) 860-7978

---

**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Sent:** Wednesday, March 24, 2021 10:47 AM  
**To:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>  
**Subject:** RE: HEADS UP - FW: NEW Litigation TSCA 1,4-Dioxane Risk Evaluation

Hi –

I talked to Joe/Jim/Bethany yesterday afternoon ... on this one, which is not on Melissa's recusal list, I advised PTSLO to move to along the "recusal flow chart" previously provided to ascertain whether or not Melissa worked on this particular case prior to leaving MA. If so, then it goes onto the recusal list. If not, then she may participate.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

---

**From:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>  
**Sent:** Tuesday, March 23, 2021 11:15 AM  
**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Subject:** FW: HEADS UP - FW: NEW Litigation TSCA 1,4-Dioxane Risk Evaluation

Just FYI  
Victoria Clarke  
Attorney-Advisor  
U.S. Environmental Protection Agency  
Office of General Counsel  
Washington, D.C. | 7348 WJCN  
EPA Office: 202-564-1149  
EPA Cell: 202-336-9101

---

**From:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>

**Sent:** Tuesday, March 23, 2021 9:51 AM

**To:** Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** Fwd: HEADS UP - FW: NEW Litigation TSCA 1,4-Dioxane Risk Evaluation

Thx and pls be sure to check w Victoria including as to any exceptions where former employer is a State.

Sent from my iPhone

Begin forwarded message:

**From:** "Cole, Joseph E." <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>

**Date:** March 23, 2021 at 9:30:29 AM EDT

**To:** "Payne, James (Jim)" <[payne.james@epa.gov](mailto:payne.james@epa.gov)>

**Subject:** HEADS UP - FW: NEW Litigation TSCA 1,4-Dioxane Risk Evaluation

FYI - note that Massachusetts is a petitioner in one of the cases below, so this would appear to make Melissa recused from the 1,4-dioxane RE litigation (in addition to the methylene chloride RE litigation).

Joe

From: Rebersak, Shannon <[rebersak.shannon@epa.gov](mailto:rebersak.shannon@epa.gov)>

Sent: Tuesday, March 23, 2021 8:36 AM

To: OGC Immediate Office All <[OGC\\_Immediate\\_Office\\_All@epa.gov](mailto:OGC_Immediate_Office_All@epa.gov)>

Cc: Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>; Fisher, Bethany

<[fisher.bethany@epa.gov](mailto:fisher.bethany@epa.gov)>; Kaczmarek, Chris <[Kaczmarek.Chris@epa.gov](mailto:Kaczmarek.Chris@epa.gov)>; Payne,

Allison <[Payne.Allison@epa.gov](mailto:Payne.Allison@epa.gov)>

Subject: NEW Litigation TSCA 1,4-Dioxane Risk Evaluation

On March 22, 2021, Petitioners: State of New York, State of Hawai'i, State of Illinois, Commonwealth of Massachusetts, State of Maine, State of Maryland, State of Minnesota, State of New Jersey, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, District of Columbia, and City of New York filed in the 9th Circuit to review the TSCA section 6(i) "no unreasonable risk" order in the 1,4-dioxane risk evaluation. The case number is not yet assigned. This petition will be consolidated with the other petitions received in the 9th Circuit.

On March 19, 2021,\* the Labor Council for Latin American Advancement filed a petition in the D.C. Circuit for review of the TSCA section 6(i) “no unreasonable risk” order and EPA’s decision that declined to consider certain uses and exposure pathways in the 1,4-dioxane risk evaluation. The case number is not yet assigned, but the case will be transferred to the 9th circuit and consolidated with the other petitions received in the 9th Circuit.

\*EPA received this petition via DOJ on March 22nd.

Shannon Rebersak  
EPA Office of General Counsel  
Pesticides and Toxic Substances Law Office  
202-564-6271  
Pronouns: she/ her / hers

**From:** [Fugh, Justina](#)  
**To:** [Payne, James \(Jim\)](#); [Cole, Joseph E.](#)  
**Cc:** [Clarke, Victoria](#)  
**Subject:** RE: HOT - Methylene Chloride rule litigation  
**Date:** Thursday, February 11, 2021 6:28:16 PM

---

Hi Jim,

I'm writing to confirm that Melissa can be consulted on the 2<sup>nd</sup> circuit challenge to methylene chloride rule ( Labor Council for Latin America, NRDC, et al. v. EPA, Case No. 19-1042, 2d Cir.). As Joe noted, Dimple is recused because of her bar rules, while Marianne is recused because her former client (NRDC) is a party, so the remaining choice among the politicals is Melissa. Joe and his staff, exhibiting excellent research skills, noticed that Melissa's recusal list included a case in a different district that appears to raise similar issues.

I had a chance to confer with Joe. For ethics purposes, although the 9<sup>th</sup> circuit case (from which Melissa is recused) may also relate to the same methylene chloride rule, it is a completely different specific party matter than the 2<sup>nd</sup> circuit case. Melissa is not recused from the 2<sup>nd</sup> circuit case, so you may discuss that specific party matter with her if you need to do so.

I'll send a confirmatory message to Melissa as well.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

**From:** Cole, Joseph E. <cole.josephe@epa.gov>  
**Sent:** Thursday, February 11, 2021 3:42 PM  
**To:** Clarke, Victoria <clarke.victoria@epa.gov>  
**Cc:** Fugh, Justina <Fugh.Justina@epa.gov>  
**Subject:** RE: HOT - Methylene Chloride rule litigation

Victoria,

Dimple appears to be recused from this apparently based on bar restrictions as one of her specifically-named cases in your earlier email (challenge to methylene chloride rule - Labor Council for Latin America, NRDC, et al. v. EPA, Case No. 19-1042, 2d Cir. NRDC), and Marianne appears to be recused because of NRDC. (b) (5)

This case involves a challenge to the methylene chloride paint and coating removal rule. (b) (5)

That risk evaluation is being challenged in litigation; one of those cases, *Neighbors for Environmental Justice et al. v. EPA et al.* (9th Cir. No. 20-72091) is the case identified with a different case number in Melissa's enclosure to impartiality determination that the Ethics Office provided "(Ninth Cir. No. 20-73276 (methylene chloride risk evaluation))." It's my understanding that the case number differences are based on a consolidation of cases.

Please provide any help on evaluating this for Jim and/or Melissa if appropriate. (b) (5)

Thanks.

Joe  
Joseph E. Cole  
Associate General Counsel  
Pesticides and Toxic Substances Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
(202) 860-7978

---

**From:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>

**Sent:** Thursday, February 11, 2021 2:44 PM

**To:** Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** Re: HOT - Methylene Chloride rule litigation

Thanks. As to whether Melissa is recused from this MC case, pls confer w Justina and let me know.  
Melissa will usually look for confirming email from Justina.

Sent from my iPhone

On Feb 11, 2021, at 1:32 PM, Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)> wrote:

Jim,

It is also my understanding that Melissa is recused from the MC risk eval litigation. (b) (5)

[REDACTED]

(b) (5)  
[REDACTED]

Joe  
Joseph E. Cole  
Associate General Counsel  
Pesticides and Toxic Substances Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
(202) 860-7978

---

**From:** Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>

**Sent:** Thursday, February 11, 2021 12:56 PM

**To:** Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>

**Subject:** Re: HOT - Methylene Chloride rule litigation

My understanding is (b) (5)

[REDACTED]

Sent from my iPhone

On Feb 11, 2021, at 12:47 PM, Payne, James (Jim)

<[payne.james@epa.gov](mailto:payne.james@epa.gov)> wrote:

(b) (5)

Sent from my iPhone

On Feb 11, 2021, at 12:46 PM, Payne, James (Jim)

<[payne.james@epa.gov](mailto:payne.james@epa.gov)> wrote:

Marianne and Dimple are recused, though not Melissa?

Sent from my iPhone

On Feb 11, 2021, at 11:30 AM, Cole, Joseph E.

<[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)> wrote:

Jim,

We're following up on the item we discussed  
with you in Tuesday's Reg Review (b) (5)

[REDACTED]

(b) (5) [Redacted text block]

(b) (5) [Redacted text block]







**From:** [Conrad, Daniel](#)  
**To:** [Keith, Jennie](#)  
**Subject:** FW: Clean Med Event/Speaker Agreement/Ethics Form  
**Date:** Thursday, April 22, 2021 1:20:37 PM  
**Attachments:** [OGC EVENT Information Form.4.19.21.docx](#)

---

Jennie,  
Let me know if you have any issues or if we can consider this approved, they'd like to have Melissa sign the speaker agreement asap (GLO reviewed it).  
-Dan

---

**From:** Stacia Clinton <sclinton@hcwh.org>  
**Sent:** Monday, April 19, 2021 4:49 PM  
**To:** Conrad, Daniel <conrad.daniel@epa.gov>  
**Cc:** (b) (6)  
**Subject:** Re: Clean Med Event/Speaker Agreement/Ethics Form

Hello Daniel,

I have accepted your approved changes to our speaker agreement and attached here for you to complete and sign.

I have also attached a completed event form that you shared previously. Please let us know if you have any questions.

Best,  
Stacia

On Fri, Apr 16, 2021 at 9:04 AM Conrad, Daniel <[conrad.daniel@epa.gov](mailto:conrad.daniel@epa.gov)> wrote:

Hello,  
I'm working with Melissa Hoffer to help setup her participation in this event, my understanding is our General Law Office has reviewed and is ok with the attached speaker agreement, on our end to get Ethics clearance it would be great if you could fill out and return to me the attached event information form, thanks.  
-Dan Conrad

Daniel H. Conrad  
Acting Associate Deputy General Counsel  
U.S. Environmental Protection Agency  
Office of General Counsel  
Office: (202) 564-0903  
Cell: (202) 507-2946

*CONFIDENTIALITY NOTICE: This message may contain deliberative, attorney-client, or otherwise privileged material. Do not release this message under FOIA without appropriate review. If you are not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, please contact the sender and delete all copies.*

--  
**Stacia Clinton, RDN.**  
Chief Program Officer

Health Care Without Harm U.S. and Practice Greenhealth  
12110 Sunset Hills Rd, Suite 600. Reston, VA 20190

(b) (6) | [www.noharm.org](http://www.noharm.org) | [Twitter](#) | [Facebook](#)





## OFFICE OF GENERAL COUNSEL EVENT INFORMATION FORM

*This form assists in planning participation in events and activities. Please be complete to minimize need for follow up. This is not a confirmation of attendance.*

### Basic Background

Event Title:	<i>CleanMed Connect</i>
Event Host(s)/Organizer(s):	<i>Health Care Without Harm, Practice Greenhealth</i>
Event Date (Flexible?):	<i>Thursday May 20 2021</i>
Time & Duration of event participation, and Time Zone:	<i>11:20-12:50pm EST for the live session. All speakers required to join at 11am ET for tech check and set up.</i>
<b>Deadline for Acceptance:</b>	<b><i>As soon as possible. Deadline has passed. Speaker accepted pending signature of speaker agreement.</i></b>
Name of EPA Official requested: Will you accept a surrogate?	<i>Melissa Hoffer. We would not accept a surrogate without prior discussion.</i>
Event Location:	<i>Virtual on Microsoft Teams platform</i>
Type of Event:	<i>3 day virtual conference. All sessions recorded and housed on virtual platform through the end of 2021.</i>
Host(s) relationship to the EPA?	<i>None</i>

### Event Description and Role of the EPA Official

Purpose of Event:	<i>CleanMed is the epicenter of health care collaboration: between departments and across sectors, among thousands of hospitals and health systems across the U.S., amidst clinicians, advocacy and community leaders, to supply chain providers and health care purchasers, and more working at the intersection of human and environmental health.</i>
Brochure / website / invitation / and/or other event materials	<i><a href="http://www.CleanMed.org">www.CleanMed.org</a></i>
Run of Show / Agenda:	<i>See full agenda at <a href="http://www.cleanmed.org">www.cleanmed.org</a></i>
Role of the EPA official at the event:	<i>Panel speaker/ presentation</i>
Requested Presentation Topic (if speaking):	<i>Aligning policy with environmental health &amp; justice</i>
Requested Presentation Format:	<i>Panel with breakouts for Q&amp;A and discussion</i>
Name of Person Introducing EPA Official:	<i>Eugenia Gibbons</i>
Audience make up?	<i>800 expected in attendance The audience for CleanMed is largely individuals working within the health care facility including: doctors, nurses, VP level leadership, sustainability directors, community benefit officers, operations staff from facilities, food service, waste management. In addition we often have some representation from our NGO partners working in environmental health, access to health care, health care quality, or health equity. The event also cultivates health care industry representatives as the sessions discuss the</i>



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	<i>way procurement and investments in health care can be leveraged for systems change.</i>
Event open to press?	<i>yes</i>
Event held Weekly, monthly, annually?	<i>annually</i>

### Event Preparation

Other EPA speakers?	<i>No</i>
Does EPA need to submit materials prior to event?	<i>Signed speaker agreement, slides due 5/4/21 if using slides, and bio</i> <i>Photo has already been received.</i>
Expected prep and timing for prep calls or meetings:	<i>1.5 hr.</i>
Registration Fee Charged? How Much?	<i>Registration fee of \$199 is waived</i>
Describe entity hosting EPA official:	<i>501(c)(3);</i>
Is the entity also a Federally Registered Lobbyist?	<i>No</i>
Are you giving a gift, award or anything else of value? Amount?	<i>No</i>
Are you providing a meal? Amount?	<i>No</i>

### At the Event and Other Event Logistics

Is there a Hold Room Available for the EPA official?	<i>N/A</i>
Open Press/Closed Press?	<i>Open press</i>
Person to contact for media purposes:	<i>Lindsey Corey, Director Communications. <a href="mailto:lcorey@hcwh.org">lcorey@hcwh.org</a></i> <i>(b) (6)</i>
Dress Code:	<i>Business / Business-Casual</i>
Room setup:	<i>Join virtually via Microsoft Teams. Production team will be available during session for technical challenges. Will need access to join via computer with video and audio capabilities.</i>
Notable/Honorable Guests Attending (including elected officials):	
Are you recording the event? Website URL for Recording (if event is recorded and posted)	<i>Yes. Recording will be on the conference platform</i>



## OFFICE OF GENERAL COUNSEL EVENT INFORMATION FORM

*This form assists in planning participation in events and activities. Please be complete to minimize need for follow up. This is not a confirmation of attendance.*

Directions to event (include relevant information about parking, the specific building, best entrance to use)	N/A
Where to meet contact:	N/A

### Contact Information

Your Name and Position	Robyn Rothman, Associate Director Climate and Health Program
Phone (best & alternate)	(b) (6) mobile
Email Address	rrothman@hcwh.org
Mailing Address	
Are you the point-of-contact at the event? If not, contact details:	Britta Ehnebuske <a href="mailto:britta@meetgreen.com">britta@meetgreen.com</a>

Please return this completed form to Dan Conrad at [conrad.daniel@epa.gov](mailto:conrad.daniel@epa.gov)

**From:** [Keith, Jennie](#)  
**To:** [Conrad, Daniel](#)  
**Subject:** RE: Clean Med Event/Speaker Agreement/Ethics Form  
**Date:** Tuesday, April 27, 2021 3:43:00 PM

---

Thanks! I met to complete my last sentence . . . *Any other offers of waived registration fees (sometimes hosts will offer additional registration slots because of the speaking engagement . . .) require ethics review.*

---

**From:** Conrad, Daniel <[conrad.daniel@epa.gov](mailto:conrad.daniel@epa.gov)>  
**Sent:** Tuesday, April 27, 2021 3:42 PM  
**To:** Keith, Jennie <[Keith.Jennie@epa.gov](mailto:Keith.Jennie@epa.gov)>  
**Subject:** RE: Clean Med Event/Speaker Agreement/Ethics Form

Thanks Jennie! I'm waiting to hear back on the additional info on the other one as well.

---

**From:** Keith, Jennie <[Keith.Jennie@epa.gov](mailto:Keith.Jennie@epa.gov)>  
**Sent:** Tuesday, April 27, 2021 3:41 PM  
**To:** Conrad, Daniel <[conrad.daniel@epa.gov](mailto:conrad.daniel@epa.gov)>  
**Subject:** RE: Clean Med Event/Speaker Agreement/Ethics Form

Dan, This is great, isn't it! I love it! So, there are no ethics concerns. Waiver of the registration fee is not a gift since Melissa is speaking. Any other offers of waived registration fees (sometimes hosts will offer additional registration slots because of the speaking engagement . . .).

Thanks!  
Jennie for OGC/Ethics

---

**From:** Conrad, Daniel <[conrad.daniel@epa.gov](mailto:conrad.daniel@epa.gov)>  
**Sent:** Thursday, April 22, 2021 1:21 PM  
**To:** Keith, Jennie <[Keith.Jennie@epa.gov](mailto:Keith.Jennie@epa.gov)>  
**Subject:** FW: Clean Med Event/Speaker Agreement/Ethics Form

Jennie,  
Let me know if you have any issues or if we can consider this approved, they'd like to have Melissa sign the speaker agreement asap (GLO reviewed it).  
-Dan

---

**From:** Stacia Clinton <[sclinton@hcwh.org](mailto:sclinton@hcwh.org)>  
**Sent:** Monday, April 19, 2021 4:49 PM  
**To:** Conrad, Daniel <[conrad.daniel@epa.gov](mailto:conrad.daniel@epa.gov)>  
**Cc:** (b) (6)

**Subject:** Re: Clean Med Event/Speaker Agreement/Ethics Form

Hello Daniel,

I have accepted your approved changes to our speaker agreement and attached here for you to complete and sign.

I have also attached a completed event form that you shared previously. Please let us know if you have any questions.

Best,  
Stacia

On Fri, Apr 16, 2021 at 9:04 AM Conrad, Daniel <[conrad.daniel@epa.gov](mailto:conrad.daniel@epa.gov)> wrote:

Hello,  
I'm working with Melissa Hoffer to help setup her participation in this event, my understanding is our General Law Office has reviewed and is ok with the attached speaker agreement, on our end to get Ethics clearance it would be great if you could fill out and return to me the attached event information form, thanks.  
-Dan Conrad

Daniel H. Conrad  
Acting Associate Deputy General Counsel  
U.S. Environmental Protection Agency  
Office of General Counsel  
Office: (202) 564-0903  
Cell: (202) 507-2946

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--

**Stacia Clinton, RDN.**  
Chief Program Officer

Health Care Without Harm U.S. and Practice Greenhealth  
12110 Sunset Hills Rd, Suite 600. Reston, VA 20190

(b) (6) | [www.noharm.org](http://www.noharm.org) | [Twitter](#) | [Facebook](#)





**From:** [Keith, Jennie](#)  
**To:** [Conrad, Daniel](#)  
**Subject:** RE: Melissa Event- FW: NYSBA Legislative Forum invitation  
**Date:** Monday, May 03, 2021 10:37:00 AM  
**Attachments:** [image001.jpg](#)

---

Dan, This will be permissible – I looked it over last week and felt good, but wanted to double-check some things. Thanks, and I'll get on the others! Jennie

---

**From:** Conrad, Daniel <conrad.daniel@epa.gov>  
**Sent:** Monday, May 03, 2021 10:33 AM  
**To:** Keith, Jennie <Keith.Jennie@epa.gov>  
**Subject:** RE: Melissa Event- FW: NYSBA Legislative Forum invitation

Jennie,  
Just checking on this one as the event planners are anxiously emailing me, let me know if we need anything else. Also Dimple was hoping to hear in regard to the event I forwarded for her participation by Tuesday, let me know if that's possible as well. Thanks  
-Dan

---

**From:** Conrad, Daniel  
**Sent:** Wednesday, April 28, 2021 10:03 AM  
**To:** Keith, Jennie <[Keith.Jennie@epa.gov](mailto:Keith.Jennie@epa.gov)>  
**Subject:** Melissa Event- FW: NYSBA Legislative Forum invitation

Jennie,  
See the below additional info and attachments I got from the NYSBA Forum folks, let me know when we are good to accept or if there are any issues, thanks.  
-Dan

Our Legislative Forum has always been thought of as primarily an educational event. I attached the OGC attendance form which indicates the two elected officials from New York that will attend this year.

What we generally do is invite the Chair of the Senate Environmental Conservation Committee and the Chair of the Assembly Environmental Conservation Committee. The invites are *pro forma* and have no relation to the political party of the elected official. This year neither Chair will attend. Last year the Chair of the Assembly EnCon Committee participated. There is no restriction on what they say – the invite is usually asks them to participate and talk about past or present accomplishments or legislative initiatives for this legislative session.

Attached are a couple of samples of previous forums. The second part is always a moderated forum dependent on the topic selected, as you will see. Again, aside from accepting the invitation based upon the topic of discussion, we do not restrict anything that is said by participants.

Finally, the Keynote speaker has always been a person of import, just as this year. Previous keynote speakers have included former NYSDEC Commissioners and a former USEPA

Regional Administrators. I don't recall any elected official participants advocating for specific candidates in elections.

Please let me know if there is additional information that would be helpful to you in finalizing the acceptance of Acting General Counsel Hoffer for this event.

Thank you in advance.

Regards,

John

**John Parker**  
**Partner**



Email: [jparker@sahnward.com](mailto:jparker@sahnward.com)

[www.sahnward.com](http://www.sahnward.com)

**Nassau/Main Office:** The Omni - 333 Earle Ovington Boulevard, Suite 601, Uniondale, NY 11553 Tel: 516.228.1300

**Suffolk Office:** 1300 Veterans Highway, Suite 100, Hauppauge, NY 11788 Tel: 631.203.4900

**New York City Office:** The Chrysler Building - 405 Lexington Avenue, 26<sup>th</sup> Floor, New York, NY 10174 Tel: 212.829.4375

**Fax for all offices:** 516.228.0038

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**From:** [Conrad, Daniel](#)  
**To:** [Keith, Jennie](#)  
**Subject:** Melissa Event- NYSBA Legislative Forum invitation  
**Date:** Monday, April 26, 2021 8:45:11 AM  
**Attachments:** [image001\[59\].jpg](#)  
[OGC EVENT Information Form.docx](#)

---

Hey Jennie, here's another event form for Melissa, NY Bar Assoc, in addition to the CleanMed one I sent last week. Let me know if you need anything else and once I hear these are approved from y'all we will set about formally accepting etc.

-Dan

---

**From:** Schaaf, Eric <[Schaaf.Eric@epa.gov](mailto:Schaaf.Eric@epa.gov)>  
**Sent:** Monday, April 26, 2021 8:42 AM  
**To:** Conrad, Daniel <[conrad.daniel@epa.gov](mailto:conrad.daniel@epa.gov)>  
**Cc:** Khoury, Lynn <[Khoury.Lynn@epa.gov](mailto:Khoury.Lynn@epa.gov)>  
**Subject:** FW: NYSBA Legislative Forum invitation

Daniel: Good morning. Please let me know if anything else is required or if we can confirm Melissa's participation. Also, do you have a bio for Melissa?

---

**From:** John L. Parker <[jparker@sahnward.com](mailto:jparker@sahnward.com)>  
**Sent:** Friday, April 23, 2021 2:55 PM  
**To:** Schaaf, Eric <[Schaaf.Eric@epa.gov](mailto:Schaaf.Eric@epa.gov)>  
**Cc:** Conrad, Daniel <[conrad.daniel@epa.gov](mailto:conrad.daniel@epa.gov)>  
**Subject:** Re: NYSBA Legislative Forum invitation

Dear Eric:

Thank you for this note. Please find attached a completed event information form. Please let me know if there are additional questions. I look forward to the event and to receiving the bio.

Again, thank you for your assistance and counsel.

Regards,

John

Get [Outlook for iOS](#)

---

**From:** Schaaf, Eric <[Schaaf.Eric@epa.gov](mailto:Schaaf.Eric@epa.gov)>  
**Sent:** Wednesday, April 21, 2021 9:09:54 AM  
**To:** John L. Parker <[jparker@sahnward.com](mailto:jparker@sahnward.com)>  
**Cc:** Conrad, Daniel <[conrad.daniel@epa.gov](mailto:conrad.daniel@epa.gov)>

**Subject:** RE: NYSBA Legislative Forum invitation

John: In response to your question about whether we can confirm Melissa's participation in the Annual Legislative Forum, we're nearly there. Attached is a form that we need to have filled out for final clearance here. N/A is acceptable if the question is not applicable to the event. I'll get back to you separately about the bio. Please let me know if you have any questions. Thanks.

Eric

Eric Schaaf  
Regional Counsel  
USEPA, Region 2  
212-637-3107

---

**From:** John L. Parker <[jparker@sahnward.com](mailto:jparker@sahnward.com)>  
**Sent:** Wednesday, April 21, 2021 7:44 AM  
**To:** Schaaf, Eric <[Schaaf.Eric@epa.gov](mailto:Schaaf.Eric@epa.gov)>  
**Subject:** Re: NYSBA Legislative Forum invitation

Dear Eric:

I hope all is well.

We are looking to promote the legislative forum but I have been on hold because I have not "formally" heard back from Ms. Hoffer.

I may have misunderstood, but will I be hearing back from her or are we cleared to announce this event?

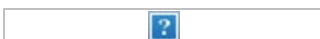
Also, and proformatively, does Ms. Hoffer have a bio that she prefers that we use for her?

Thanks for your assistance once again.

Regards,

John

**John Parker**  
**Partner**



Email: [jparker@sahnward.com](mailto:jparker@sahnward.com)

[www.sahnward.com](http://www.sahnward.com)

**Nassau/Main Office:** The Omni - 333 Earle Ovington Boulevard, Suite 601, Uniondale, NY 11553 Tel: 516.228.1300

**Suffolk Office:** 1300 Veterans Highway, Suite 100, Hauppauge, NY 11788 Tel: 631.203.4900

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---

**From:** Schaaf, Eric <[Schaaf.Eric@epa.gov](mailto:Schaaf.Eric@epa.gov)>

**Date:** Friday, April 16, 2021 at 1:10 PM

**To:** John L. Parker <[jparker@sahnward.com](mailto:jparker@sahnward.com)>

**Subject:** RE: NYSBA Legislative Forum invitation

John: I'm happy to have been able to help. I heard again from Melissa this morning and she's looking forward to participating. I am also planning to attend. "See" you then.

Eric

Eric Schaaf  
Regional Counsel  
USEPA, Region 2  
212-637-3107

---

**From:** John L. Parker <[jparker@sahnward.com](mailto:jparker@sahnward.com)>

**Sent:** Friday, April 16, 2021 9:35 AM

**To:** Schaaf, Eric <[Schaaf.Eric@epa.gov](mailto:Schaaf.Eric@epa.gov)>

**Subject:** NYSBA Legislative Forum invitation

Dear Eric:

I hope all is well.

I wanted to thank you for assisting our NYSBA Environmental and Energy Law Section

connect with Acting General Counsel Hoffer to offer to her an invitation to our May 19, 2021 Legislative Forum.

All of us greatly appreciate your courtesy and thoughtfulness regarding the event.

I hope that you will join us as well.

Please let me know if you have any questions or need additional information.

Thank you for your consideration.

Regards,

John Parker  
Chair  
Legislation Committee  
Environmental and Energy Law Section  
New York State Bar Association

**John Parker**  
**Partner**



Email: [jparker@sahnward.com](mailto:jparker@sahnward.com)

[www.sahnward.com](http://www.sahnward.com)

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## OFFICE OF GENERAL COUNSEL EVENT INFORMATION FORM

*This form assists in planning participation in events and activities. Please be complete to minimize need for follow up. This is not a confirmation of attendance.*

### Basic Background

Event Title:	2021 NYSBA Legislative Forum
Event Host(s)/Organizer(s):	NYS Bar Association – Environmental and Energy Law Section
Event Date (Flexible?):	May 19, 2021
Time & Duration of event participation, and Time Zone:	10 am to 1 pm EST: Keynote Address 12 noon.
<b>Deadline for Acceptance:</b>	<b>ASAP</b>
Name of EPA Official requested: Will you accept a surrogate?	Melissa Hoffer, Principal Deputy General Counsel
Event Location:	Virtual.
Type of Event:	Annual Legislative Forum
Host(s) relationship to the EPA?	Environmental and Energy Law Section

### Event Description and Role of the EPA Official

Purpose of Event:	Discuss new and emerging environmental law issues
Brochure / website / invitation / and/or other event materials	Invitation in formation / web posting in formation
Run of Show / Agenda:	10 am - 11 am: introduction of Legislators; presentation of environmental and energy law issues; moderated questions 11 am – 12 noon; panel discussion of local environmental accomplishments (in formation); moderated questions 12 noon – 1 pm; Keynote Address; moderated questions to follow
Role of the EPA official at the event:	Deliver Keynote Address discussing environmental law issues.
Requested Presentation Topic (if speaking):	At discretion of speaker; requested focus on view toward current and future environmental law developments
Requested Presentation Format:	Keynote Address
Name of Person Introducing EPA Official:	John Parker, Chair Legislation Committee
Audience make up?	Traditionally in person event has 100-125 people; virtual audience uncertain.
Event open to press?	No press restrictions
Event held Weekly, monthly, annually?	Annual

### Event Preparation

Other EPA speakers?	N/A
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## OFFICE OF GENERAL COUNSEL EVENT INFORMATION FORM

*This form assists in planning participation in events and activities. Please be complete to minimize need for follow up. This is not a confirmation of attendance.*

Does EPA need to submit materials prior to event?	<i>Biography; picture if available but not necessary</i>
Expected prep and timing for prep calls or meetings:	<i>N/A</i>
Registration Fee Charged? How Much?	<i>No</i>
Describe entity hosting EPA official:	<i>501(c)(6); professional association</i>
Is the entity also a Federally Registered Lobbyist?	<i>No, but has an outside consultant that is registered under the LDA.</i>
Are you giving a gift, award or anything else of value? Amount?	<i>No.</i>
Are you providing a meal? Amount?	<i>N/A</i>

### At the Event and Other Event Logistics

Is there a Hold Room Available for the EPA official?	<i>N/A</i>
Open Press/Closed Press?	<i>No restrictions</i>
Person to contact for media purposes:	<i>John Parker, Chair Legislation Committee</i>
Dress Code:	<i>Business Professional</i>
Room setup:	<i>N/A - virtual</i>
Notable/Honorable Guests Attending (including elected officials):	<i>Hon. Peter Harckham, NY State Senator Hon. Steve Otis, NY Assemblyman</i>
Are you recording the event? Website URL for Recording (if event is recorded and posted)	
Directions to event (include relevant information about parking, the specific building, best entrance to use)	<i>N/A</i>
Where to meet contact:	<i>N/A</i>

### Contact Information

Your Name and Position	<i>John Parker, Chair, Legislation Committee</i>
Phone (best & alternate)	<i>(b) (6)</i>
Email Address	<i>jparker@sahnward.com</i>
Mailing Address	<i>300</i>





## OFFICE OF GENERAL COUNSEL EVENT INFORMATION FORM

*This form assists in planning participation in events and activities. Please be complete to minimize need for follow up. This is not a confirmation of attendance.*

Are you the point-of-contact at the event? If not, contact details:	Yes
---	-----

Please return this completed form to Dan Conrad at [conrad.daniel@epa.gov](mailto:conrad.daniel@epa.gov)

**From:** [Griffo, Shannon](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Clarke, Victoria](#)  
**Subject:** RE: Melissa's recusals  
**Date:** Thursday, March 11, 2021 9:48:49 AM

---

Justina, here is some fo the background (b) (5)

[REDACTED]

My Response: (b) (5)

[REDACTED]

---

**From:** Fugh, Justina <Fugh.Justina@epa.gov>  
**Sent:** Wednesday, March 10, 2021 9:20 PM  
**To:** Orlin, David <Orlin.David@epa.gov>  
**Cc:** Clarke, Victoria <clarke.victoria@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>  
**Subject:** RE: Melissa's recusals

Hi David,

From our perspective, Melissa and Ale are quite different: Melissa came from a state and is therefore not subject to the additional restrictions of the Biden ethics pledge regarding her former employer, while Ale worked for the Sierra Club and the Coalition for Green Capital within the past two years so faces additional restrictions. Let me confer with both Shannon and Victoria tomorrow, and we'll get back to you.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

---

**From:** Orlin, David <[Orlin.David@epa.gov](mailto:Orlin.David@epa.gov)>

**Sent:** Wednesday, March 10, 2021 9:03 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** RE: Melissa's recusals

Hi Justina,

This is heating up a little so I want to close the loop on whether Melissa (and, possibly, Alejandra Nunez) are recused from participating in upcoming work on California waivers.

In 2013 EPA granted a waiver to California to allow it to enforce certain light duty vehicle emission standards (notwithstanding that most state emissions standards are preempted by the CAA). (b) (5)

[REDACTED]

I understand Melissa is recused from any discussions over the litigation concerning SAFE 1 because of her work for Massachusetts (but the litigation has been put into abeyance so that is unlikely to come up). (b) (5)

[REDACTED]

[REDACTED] To date I have assumed that is not a problem but it occurred to me that we didn't entirely close out our discussion.

Also, I believe Ale Nunez is likely recused to the same degree/for the same reasons as Melissa due to her work before coming to EPA, but if you have any advice about whether the analysis would be substantially different for her than for Melissa that would be good to know.

Thanks,

David Orlin

U.S. EPA, Office of General Counsel

(202) 564-1222

---

**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Tuesday, February 02, 2021 7:29 PM

**To:** Orlin, David <[Orlin.David@epa.gov](mailto:Orlin.David@epa.gov)>

**Subject:** RE: Melissa's recusals

Hi David,

It's easiest for me to embed answers in the incoming messages:

I don't know whether Melissa worked personally and substantially on the States' petition but for these purposes I will assume she did.

JUSTINA: Why assume? Because it's likely that she did? Given her role in the MA AG's office, I agree it's probably likely, but we could find out for sure. If she did personally participate in the states' petition, or supervised lawyers who did, then she does have a bar restriction and is recused. But if she did not participate personally and substantially, then I've issued an impartiality determination

(dated 2/1/21) to permit her to work on specific party matters with MA that she did not otherwise work on herself.

(b) (5)  
[Redacted]  
[Redacted]  
[Redacted]

- [Redacted]  
[Redacted]  
[Redacted]
- [Redacted]  
[Redacted]

[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

(b) (5)  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

[Redacted] I need more info ...

Sigh,  
Justina

---

**From:** Orlin, David <[Orlin.David@epa.gov](mailto:Orlin.David@epa.gov)>

**Sent:** Tuesday, February 02, 2021 7:12 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** RE: Melissa's recusals

Thanks Justina!

I don't know whether Melissa worked personally and substantially on the States' petition but for these purposes I will assume she did. (b) (5)

[Redacted]  
[Redacted] (Let me know if I have that wrong).

(b) (5)  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

[Redacted] Would it still be a matter of  
general applicability for ethics purposes, and if not does that change the answer?

David Orlin  
U.S. EPA, Office of General Counsel  
(202) 564-1222

---

**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Tuesday, February 02, 2021 7:05 PM

**To:** Orlin, David <[Orlin.David@epa.gov](mailto:Orlin.David@epa.gov)>

**Subject:** RE: Melissa's recusals

Hi David,  
Let me see ...

The agency has pending before it several petitions for reconsideration of the SAFE 1 final action, including one petition filed by a number of states, including my home state, the Commonwealth of Massachusetts. (In addition, if it matters, Massachusetts has petitioned for review of SAFE 1).

JUSTINA: Because these petitions are not joined together in one mega-petition, but instead are separate, then we consider each one to be a separate specific party matter. In ethics, there is an important distinction between specific party matters and matters of general applicability. For my answer, I will assume that Melissa worked personally and substantially on the petition that was filed by the states. If that's not correct, please tell me.

(b) (5)

JUSTINA: Okay, so here's the thing: it doesn't matter how the agency gets to the place where it wants to undertake new final agency action. Melissa can work on the new rulemaking no matter how you get there because the rulemaking is a matter of general applicability. What she can't work on is the one petition for reconsideration that was filed by the states because that is the specific party matter from which she is recused. It flat out doesn't matter whether the other petitions mirror the same reasons as the state petition or not. She is not recused from the other petitions, just the one that was filed by the states.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Orlin, David <[Orlin.David@epa.gov](mailto:Orlin.David@epa.gov)>

**Sent:** Tuesday, February 02, 2021 6:51 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** Melissa's recusals

Justina,

Since (as you know) the reward for answering questions quickly and helpfully is more questions, I have another recusal question for you.

The agency has pending before it several petitions for reconsideration of the SAFE 1 final action, including one petition filed by a number of states, including my home state, the Commonwealth of Massachusetts. (In addition, if it matters, Massachusetts has petitioned for review of SAFE 1).

(b) (5)

(b) (5)

Let me know if this isn't clear or you need additional info.

Thanks!

David Orlin

U.S. EPA, Office of General Counsel

(202) 564-1222

**From:** [Fugh, Justina](#)  
**To:** [Wehling, Carrie](#)  
**Cc:** [Clarke, Victoria](#)  
**Subject:** RE: Recusal followup re WOTUS and Dimple/Melissa  
**Date:** Tuesday, February 02, 2021 4:07:31 PM  
**Attachments:** [image002.gif](#)

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Hi Carrie,

I was thinking about you and (b) (6) recently as I watched (in my copious amounts of free time) a few episodes of the Great British Baking Show. I recall his saying that you both enjoyed that immensely. I'm struggling with how to explain the recusal analytical process more effectively, so am copying Victoria who is going to try to make a flow chart. Let's see:

YOU ASKED: we understand it from your previous emails (thank you), they are recused from specific WOTUS cases in which they or their former employee are parties but not from *policy* deliberations about the WOTUS litigation generally or the underlying rulemaking.

JUSTINA: Not exactly. In federal ethics and bar rules, there is a distinction between "specific party matters" and "matters of general applicability." Litigation is always a specific party matter while rulemaking is nearly always a matter of general applicability. The definition of "waters of the United States" is actually just a "matter" for our ethics purposes. What I did was to write an impartiality determination to allow Melissa, as PDGC and Acting General Counsel, to make a policy decision on behalf of the Administration on a collection of cases. That decision was a policy determination that did not require her to participate personally and substantially in the underlying cases at all. She is therefore able to preserve the confidences of her former employer/client without involving herself in the specific party matters from which she is recused.

YOU ASKED: So the question we have before us is whether we can discuss the following types of issues with them – I think of these as policy issues about the litigation but want to confirm:

1. (b) (5)

JUSTINA: No, that is not a policy determination but rather a question about litigation strategy in cases from which they may be recused.

2. (b) (5)

JUSTINA: No. Again, this is a question of litigation strategy, not an overarching policy determination.

3. (b) (5)

JUSTINA: It seems to me that this discussion will still require a consideration of litigation strategy, so NO.

Fundamentally, Melissa, Dimple and Marianne must abide by their bar obligations and, in addition, Dimple and Marianne have Biden ethics pledge obligations. Once you determine that a case is on their recusal list, don't interact with them on that case. Full stop.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Wehling, Carrie <Wehling.Carrie@epa.gov>

**Sent:** Tuesday, February 02, 2021 3:44 PM

**To:** Fugh, Justina <Fugh.Justina@epa.gov>

**Subject:** Recusal followup re WOTUS and Dimple/Melissa

Hi, Justina – I know you are super busy but we have a followup question (surprise!) about the scope of the recusal for Dimple and Melissa on the WOTUS litigation ( as you know we have about 20 cases pending right now). As we understand it from your previous emails (thank you), they are recused from specific WOTUS cases in which they or their former employee are parties but not from *policy* deliberations about the WOTUS litigation generally or the underlying rulemaking. So the question we have before us is whether we can discuss the following types of issues with them – I think of these as policy issues about the litigation but want to confirm: 1) (b) (5)

[REDACTED], 2) (b) (5)

[REDACTED] and 3) (b) (5)

[REDACTED]

[REDACTED] We have a “hot topics” meeting with one or both of them on Thursday morning, so naturally, an answer before then would be helpful.

Or I can just call you to discuss – let me know your preference.

Thanks.

Carrie

Caroline (Carrie) Wehling

Assistant General Counsel

Water Law Office

U.S. Environmental Protection Agency

Washington DC 20004

202-564-5492

[wehling.carrie@epa.gov](mailto:wehling.carrie@epa.gov)

**From:** [Fugh, Justina](#)  
**To:** [Clarke, Victoria](#)  
**Subject:** RE: oh, I think I'll first ask Andrea Priest for the names of the underlying cases  
**Date:** Monday, April 26, 2021 10:07:57 AM

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Yeah, now that we know she is correctly recused from the consolidated cases (your advice was spot on there!), we need to think about (b) (5). For that, I'll draw in Shannon. (b) (5) (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

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**From:** Clarke, Victoria <clarke.victoria@epa.gov>

**Sent:** Monday, April 26, 2021 9:57 AM

**To:** Fugh, Justina <Fugh.Justina@epa.gov>

**Subject:** RE: oh, I think I'll first ask Andrea Priest for the names of the underlying cases

Yeah, I did wonder why a Massachusetts case filed in October 2020 didn't appear on the list for the impartiality determination, but that really was on me to confirm with Andrea so we could update the impartiality determination case list if necessary, rather than make the assumption that Melissa was recused and just move on without corrective action. But! Hopefully, corrective action will come soon. On a process standpoint, we wouldn't just flag the initial case with Massachusetts, but also the case it was consolidated into, correct, since the consolidated case is tainted?

Victoria Clarke

Attorney-Advisor

U.S. Environmental Protection Agency

Office of General Counsel | Ethics Office

Washington, D.C. | 7348 WJCN

EPA Office: 202-564-1149

EPA Cell: 202-336-9101

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](#)>

**Sent:** Monday, April 26, 2021 9:25 AM

**To:** Clarke, Victoria <[clarke.victoria@epa.gov](#)>

**Subject:** oh, I think I'll first ask Andrea Priest for the names of the underlying cases

Duh. Should have thought of that first. It's quite possible that one of the underlying cases is on Melissa's list!

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**From:** Fugh, Justina

**Sent:** Monday, April 26, 2021 9:17 AM

**To:** Clarke, Victoria <[clarke.victoria@epa.gov](#)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Victoria,

I'm sorry that I wasn't more clear, but I didn't intend for my note to be instructive *for the future*; rather, I meant for you to ascertain factually whether this particular case is a conflict or not. I curated that list of cases with Melissa, MA and OGC, so I am not expecting to find a case for which a decision hasn't already been made. This is a situation in which you can't make a prudential guess. You really need to do the work to find out the answer because there are repercussions. We need to: (b) (5)

[REDACTED]



(b) (5)

I will send Melissa a note to ask her if she recognizes this particular case or not.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Sent:** Monday, April 26, 2021 7:31 AM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

I looked at the list in the impartiality determination, and it lists out cases pending with EPA's OGC where MA is a party or an intervenor. I didn't think that this necessarily meant that simply because a case isn't on that list doesn't mean that Melissa didn't work on it personally and substantially, all it means is that the case currently isn't on EPA's radar, or am I misinterpreting the scope of that list and how it was developed? The underlying MA complaint in the consolidated in Re CWA Act litigation was filed October 2020, which was before Melissa joined us from the State of Massachusetts. Maybe that was case was on Region 10's radar, or it hadn't come to OGC's attention, yet? In any event, I thought there might be a distinction between "pending with OGC from Massachusetts" and "worked on personally and substantially by Melissa," with the latter being something way too time consuming and broad for Melissa to put together, so we opted for the OGC screen?

But yes, your approach is tactfully better and I will incorporate that next time.

Victoria Clarke

Attorney-Advisor

U.S. Environmental Protection Agency

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Sunday, April 25, 2021 4:38 PM

**To:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** FW: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Hi Victoria –

I was re-reading your note – which I think is really helpful! – but because we are talking about recusal, I think you have to be as accurate as possible about the advice. Do you actually know that Melissa is recused from In Re CWA? She has a list of specific cases from which she I recused, but did you check it? It's attached, and I didn't see this case on her list. I would have hedged to say that it does not appear to be on her list, but given the timing of the case, it's worth double checking rather than concluding she is absolutely recused.

***In re Clean Water Act Rulemaking***, 3:20-cv-04636-WHA (N.D. Cal.) (3 consolidated cases)

- Melissa would be recused if she worked personally and substantially on this with the State of Massachusetts. Given the subject of the case and the probable timing, let's assume that she was involved and that this is not a new matter that she would be permitted to work on, per her impartiality determination.

Here's the summary chart – red means you can't talk to the political, while green means

you can:

	In Re CWA	Delaware Riverkeeper	SC Coastal
Marianne	NO	YES	NO
Dimple	YES	YES	NO
Melissa	NO	YES	YES

Justina

---

**From:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto: Priest.Andrea@epa.gov)>

**Sent:** Friday, April 23, 2021 3:03 PM

**To:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto: clarke.victoria@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto: Fugh.Justina@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto: Messier.Dawn@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Thanks, Victoria. Based on the information provided, it sounds like we could only potentially consult with Marianne on the Delaware Riverkeeper lawsuit. Would there be an issue with consulting with her on that case if we are unable to consult with her on the other 401 Certification Rule cases due to conflicts?

The three cases are not consolidated and are all currently proceeding in different circuits. The N.D. California case is actually a consolidated case of three lawsuits brought in that district, but there has not been any request for further consolidation of these cases at this point.

---

**From:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto: clarke.victoria@epa.gov)>

**Sent:** Friday, April 23, 2021 1:53 PM

**To:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto: Priest.Andrea@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto: Fugh.Justina@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto: Messier.Dawn@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

And EarthJustice, because I can read emails, hah!

Out of curiosity, are these three cases all consolidated or do they plan to be consolidated?

Victoria Clarke

Attorney-Advisor

U.S. Environmental Protection Agency

Office of General Counsel | Ethics Office

Washington, D.C. | 7348 WJCN

EPA Office: 202-564-1149

EPA Cell: 202-336-9101

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**From:** Clarke, Victoria

**Sent:** Friday, April 23, 2021 1:47 PM

**To:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto: Priest.Andrea@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto: Fugh.Justina@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto: Messier.Dawn@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Hi Andrea,

Unfortunately, while Marianne may have a pledge waiver for NRDC, her recusal list is quite long. For example, among Marianne's former clients include Sierra Club and Waterkeeper Alliance, and also the University of Vermont (and therefore the State of Vermont). I see those entities as cropping up in the various suits below, except in the Delaware Riverkeeper lawsuit.

Victoria

Victoria Clarke

Attorney-Advisor

U.S. Environmental Protection Agency

Office of General Counsel | Ethics Office  
Washington, D.C. | 7348 WJCN  
EPA Office: 202-564-1149  
EPA Cell: 202-336-9101

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**From:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto: Priest.Andrea@epa.gov)>

**Sent:** Friday, April 23, 2021 12:52 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto: Fugh.Justina@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto: clarke.victoria@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto: Messier.Dawn@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Thanks, Justina! This is incredibly helpful. Since we have three cases in the 401 Certification Rule litigation, I listed the parties (by plaintiffs and defendant inventors) separately under each case. The first case is actually three separate cases which were consolidated in the Northern District of California, so it has the longest list of parties (including the state plaintiffs). Since several of the environmental organization plaintiffs are being represented by environmental non-profits (like Earthjustice and the Southern/Western Environmental Law Centers) I noted those groups next to the parties they represent, and grouped those plaintiffs together. I can also pass along a full list of the attorneys representing all of the parties, including the law firms involved in representing the industry defendant intervenors if that would be helpful, just let me know.

Thank you again for all of your help sorting this out! I appreciate that the significant number of parties makes this a complicated process for this litigation.

***In re Clean Water Act Rulemaking***, 3:20-cv-04636-WHA (N.D. Cal.) (3 consolidated cases)

- Plaintiffs: -> **Marianne; Melissa**
  - California
  - Colorado
  - Connecticut
  - District of Columbia
  - Illinois
  - Maine
  - Maryland
  - **Massachusetts**
  - Michigan
  - Minnesota
  - Nevada
  - New Jersey
  - New Mexico
  - New York
  - North Carolina
  - Oregon
  - Rhode Island
  - Vermont
  - Virginia
  - Washington
  - Wisconsin
  - California State Water Resources Control Board
  - **Sierra Club**
  - Squamish Tribe, Pyramid Lake Paiute Tribe, Orutsarmiut Native Council,

Columbia Riverkeeper (represented by Earthjustice)

- American Rivers, American Whitewater, California Trout, Idaho Rivers United (represented by Western Environmental Law Center)

- Defendant Intervenors:

- American Petroleum Institute
- Interstate Natural Gas Association of America
- National Hydropower Association
- Arkansas
- Louisiana
- Mississippi
- Missouri
- Montana
- Texas
- West Virginia
- Wyoming

***Delaware Riverkeeper Network v. U.S. EPA*, 2:20-cv-03412 (E.D. PA)**

- Plaintiffs:

- Delaware Riverkeeper Network
- Delaware Riverkeeper, Maya Van Rossum

- Defendant Intervenors:

- American Petroleum Institute
- Interstate Natural Gas Association of America
- National Hydropower Association
- Arkansas
- Louisiana
- Mississippi
- Missouri
- Montana
- Texas
- West Virginia
- Wyoming

***South Carolina Costal Conservation League v. U.S. EPA*, No. 2:20-cv-03062-BHH**

- Plaintiffs (represented by Southern Environmental Law Center): Marianne, Dimple

- South Carolina Costal Conservation League
- NRDC (pledge waiver)
- Amigos Bravos
- Savannah Riverkeeper
- Waterkeeper Alliance
- South Carolina Native Plant Society

- Defendant Intervenors:

- American Petroleum Institute
- Interstate Natural Gas Association of America
- National Hydropower Association
- Arkansas
- Louisiana
- Mississippi

- Missouri
- Montana
- Texas
- West Virginia
- Wyoming

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Thursday, April 22, 2021 6:17 PM

**To:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto:Priest.Andrea@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto:Messier.Dawn@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Hi Andrea,

The short answer is maybe. With regard to NRDC, you may now engage with Marianne Engelman-Lado on specific party matters, even if NRDC is a party, so long as she has no other restrictions. Attached you will find the waiver that Jim Payne recently signed a waiver, after consultation with the White House, to permit Marianne to work personally and substantially on certain matters even if NRDC is a party or represents a party, provided that: (a) she did not previously participate in those same specific party matters prior to joining EPA, and (b) she is not otherwise recused from participation, such as if another one of her former employers is present or she has a financial conflict of interest. We have not yet finalized any recusal statement for her, so I can't yet give you a full list of her recusals, but it's fairly robust. If you can tell us who all the parties are in the litigation (you do not need to include *amicus* filings) for the CWA 401 certification rule, we will be able to give you a definitive answer about her involvement.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto:Priest.Andrea@epa.gov)>

**Sent:** Thursday, April 22, 2021 3:02 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto:Messier.Dawn@epa.gov)>

**Subject:** Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Hi Justina,

I wanted to check in with you about a recusal question for Marianne from the WLO. For the litigation on the CWA 401 Certification Rule, we have a "double recusal" situation in OGC where both Dimple and Melissa are recused from involvement in the litigation due to their prior work, as NRDC and MA are each involved as parties to one of the several cases challenging the 401 Certification Rule. As a result, we have been working with Jim Payne as our OGC FO contact on these cases. However, we were recently advised that Marianne may not be recused from all of the matters in which NRDC is a party. We wanted to check in with you about Marianne's recusal status, and whether we would be able to involve Marianne in discussions regarding the 401 Certification Rule litigation (either for all of the cases or just for the cases in which NRDC is not a party). Is this a possibility for any of the 401 Certification

Rule cases?

Thanks, we appreciate your help in sorting this all out! Please let me know if I can provide any additional information on this.

-Andrea

Andrea Priest

Water Law Office

Office of General Counsel

U.S. Environmental Protection Agency

(202) 564-4914

**From:** [Clarke, Victoria](#)  
**To:** [Fugh, Justina](#)  
**Subject:** FW: Recusal Question for Marianne- CWA 401 Certification Rule Litigation  
**Date:** Monday, April 26, 2021 9:58:00 AM  
**Attachments:** [CWA 401 rule complaint state case ndca 7.21.20.pdf](#)

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It is on the list that she's recused from:

N.D. Cal. No. 20-cv-04869 (limiting state authority re Section 401 water quality certifications)

Phew!

Victoria Clarke

Attorney-Advisor

U.S. Environmental Protection Agency

Office of General Counsel | Ethics Office

Washington, D.C. | 7348 WJCN

EPA Office: 202-564-1149

EPA Cell: 202-336-9101

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**From:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto: Priest.Andrea@epa.gov)>

**Sent:** Monday, April 26, 2021 9:56 AM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto: Fugh.Justina@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto: Messier.Dawn@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto: clarke.victoria@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

[Absolutely. The initial CWA 401 Certification Rule case with Massachusetts as a party in the Northern District of California prior to case consolidation was \*California v. U.S. EPA\*, 3:20-cv-04869. This case involved all of the state plaintiffs \(and D.C.\) listed below in the consolidated case. I attached the Complaint from that case, just in case it is helpful.](#)

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto: Fugh.Justina@epa.gov)>

**Sent:** Monday, April 26, 2021 9:39 AM

**To:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto: Priest.Andrea@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto: Messier.Dawn@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto: clarke.victoria@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Hi Andrea,

We noticed that one of the cases you mentioned is consolidated (*In re Clean Water Act Rulemaking*, 3:20-cv-04636-WHA (N.D. Cal.) (3 consolidated cases)), and that

Massachusetts is now a party to that consolidated case. But can you tell us the name of the case in which Massachusetts was a party, prior to consolidation? We may need to update the list of Melissa's recused cases (see attached) that were provided with her impartiality determination.

Thanks,

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto: Priest.Andrea@epa.gov)>

**Sent:** Friday, April 23, 2021 6:31 PM

**To:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto: clarke.victoria@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto: Fugh.Justina@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto: Messier.Dawn@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Thanks, Victoria. This is very helpful. I'll share this with the litigation team to plan how to proceed.

---

**From:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Sent:** Friday, April 23, 2021 4:16 PM

**To:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto: Priest.Andrea@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto:Messier.Dawn@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Hi Andrea,

I may have been hasty in categorizing the state of Vermont into Marianne's recusal obligations, so we'll put a pin in that - though unfortunately for your purposes, Sierra Club and Earth Justice are still a party to the litigation with Vermont, so Marianne is still out on the first one.

Let's take this time to think closely about recusal and how strict or not strict it is.

- Pledge Obligations:
  - Marianne and Dimple have pledge obligations, which prevent them from participating in specific party matters where their employers or former clients are party or represent a party for 2 years from the day they entered federal service, absent a waiver.
- Impartiality Obligation:
  - Ordinarily, Melissa would have an obligation under the impartiality rule to recuse from specific party matters where the State of Massachusetts is a party or represents a party, as they were her client while with the MA Attorney General's Office. Unlike the Pledge, this only lasts for one year.
  - Melissa has 2 impartiality determinations that, despite the restriction above, allow her:
    - To make policy decisions as to whether or not continue to pursue current Agency litigation, provided she is not participating in the underlying merits of the case and sticks to the broad policy decision only.
    - To participate in new matters that involve that State of Massachusetts, provided that she did not participate personally and substantially on that matter while employed with the MA's Attorney General's Office.
- Bar Obligations:
  - Marianne, Dimple, and Melissa are obliged to protect the confidences of their former clients and cannot switch sides.
  - Marianne, Dimple, and Melissa also may not participate in any matter that is the same or substantially related to the same specific party matter that they participated in personally and substantially unless their bar provides for and they obtain informed consent.

Because each of these cases in your initial email is distinct and the three together are not consolidated (though one case is a consolidated case itself), and therefore they have their own individual case numbers, in Ethics, we consider all three cases to be separate specific party matters. The facts may be similar, and maybe the Agency's litigation strategy might be similar, but the parties and therefore the interests involved are all different.

***In re Clean Water Act Rulemaking, 3:20-cv-04636-WHA (N.D. Cal.) (3 consolidated cases)***

- There are three underlying cases in this litigation that have been consolidated. Therefore,



they are all considered the same specific party matter for our purposes in Ethics. Said another way, If one political appointee is conflicted out of a case, and then that case is consolidated with others, the political appointee is then recused from all of the cases in that consolidation.

- Marianne is recused under the Biden Pledge because at least two former clients of hers (Sierra Club, EarthJustice) are parties to the litigation.
- Dimple's former employer is not a party to the case, nor has she disclosed that she worked on any CWA 401 litigation for any other entity or client that has appeared on this list. So, it would appear that Dimple is not recused here.
- Melissa would be recused if she worked personally and substantially on this with the State of Massachusetts. Given the subject of the case and the probable timing, let's assume that she was involved and that this is not a new matter that she would be permitted to work on, per her impartiality determination.

***Delaware Riverkeeper Network v. U.S. EPA*, 2:20-cv-03412 (E.D. PA)**

- Neither Marianne, Dimple, nor Melissa appear to be recused from this case, given the parties involved and the cases they have disclosed they have worked on personally and substantially.

***South Carolina Coastal Conservation League v. U.S. EPA*, No. 2:20-cv-03062-BHH**

- Marianne is recused under the Biden Pledge, because a former client (Waterkeeper Alliance) is involved. If they were out and it was just NRDC, then Marianne could work on it because of the Pledge waiver. Alas, this is not so.
- Dimple is out because of the Pledge, as NRDC is her former employer.
- Melissa does not appear to be recused, as Massachusetts is not a party.

Here's the summary chart – red means you can't talk to the political, while green means you can:

	In Re CWA	Delaware Riverkeeper	SC Coastal
Marianne	NO	YES	NO
Dimple	YES	YES	NO
Melissa	NO	YES	YES

In practicality, this means that you could talk to Dimple about the facts and merits of In Re CWA and Delaware River Keeper. You cannot talk to her about SC Coastal at all, even in a hypothetical, because then you'd be forcing her to break the Pledge. Any conversation that you have with her must be focused solely on the other two cases. (b) (5)

But as you can see, you're not going to have a perfect situation where a political appointee is going to be readily available to talk to you about all three cases at once. You are going to have to be surgical, strategic, and selective.

Victoria

Victoria Clarke

Attorney-Advisor

U.S. Environmental Protection Agency

Office of General Counsel | Ethics Office

Washington, D.C. | 7348 WJCN

EPA Office: 202-564-1149

EPA Cell: 202-336-9101

---

**From:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto: Priest.Andrea@epa.gov)>

**Sent:** Friday, April 23, 2021 3:03 PM

**To:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto:Messier.Dawn@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Thanks, Victoria. Based on the information provided, it sounds like we could only potentially consult with Marianne on the Delaware Riverkeeper lawsuit. Would there be an issue with consulting with her on that case if we are unable to consult with her on the other 401 Certification Rule cases due to conflicts?

The three cases are not consolidated and are all currently proceeding in different circuits. The N.D. California case is actually a consolidated case of three lawsuits brought in that district, but there has not been any request for further consolidation of these cases at this point.

---

**From:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Sent:** Friday, April 23, 2021 1:53 PM

**To:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto:Priest.Andrea@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto:Messier.Dawn@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

And EarthJustice, because I can read emails, hah!

Out of curiosity, are these three cases all consolidated or do they plan to be consolidated?

Victoria Clarke

Attorney-Advisor

U.S. Environmental Protection Agency

Office of General Counsel | Ethics Office

Washington, D.C. | 7348 WJCN

EPA Office: 202-564-1149

EPA Cell: 202-336-9101

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**From:** Clarke, Victoria

**Sent:** Friday, April 23, 2021 1:47 PM

**To:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto:Priest.Andrea@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto:Messier.Dawn@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Hi Andrea,

Unfortunately, while Marianne may have a pledge waiver for NRDC, her recusal list is quite long. For example, among Marianne's former clients include Sierra Club and Waterkeeper Alliance, and also the University of Vermont (and therefore the State of Vermont). I see those entities as cropping up in the various suits below, except in the Delaware Riverkeeper lawsuit.

Victoria

Victoria Clarke

Attorney-Advisor

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**From:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto:Priest.Andrea@epa.gov)>

**Sent:** Friday, April 23, 2021 12:52 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto:Messier.Dawn@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Thanks, Justina! This is incredibly helpful. Since we have three cases in the 401 Certification Rule litigation, I listed the parties (by plaintiffs and defendant inventors) separately under each case. The first case is actually three separate cases which were consolidated in the Northern District of California, so it has the longest list of parties (including the state plaintiffs). Since several of the environmental organization plaintiffs are being represented by environmental non-profits (like Earthjustice and the Southern/Western Environmental Law Centers) I noted those groups next to the parties they represent, and grouped those plaintiffs together. I can also pass along a full list of the attorneys representing all of the parties, including the law firms involved in representing the industry defendant intervenors if that would be helpful, just let me know.

Thank you again for all of your help sorting this out! I appreciate that the significant number of parties makes this a complicated process for this litigation.

***In re Clean Water Act Rulemaking***, 3:20-cv-04636-WHA (N.D. Cal.) (3 consolidated cases)

- Plaintiffs: -> Marianne; Melissa
  - California
  - Colorado
  - Connecticut
  - District of Columbia
  - Illinois
  - Maine
  - Maryland
  - Massachusetts
  - Michigan
  - Minnesota
  - Nevada
  - New Jersey
  - New Mexico
  - New York
  - North Carolina
  - Oregon
  - Rhode Island
  - Vermont
  - Virginia
  - Washington
  - Wisconsin
  - California State Water Resources Control Board
  - Sierra Club
  - Squamish Tribe, Pyramid Lake Paiute Tribe, Orutsararmiut Native Council, Columbia Riverkeeper (represented by Earthjustice)
  - American Rivers, American Whitewater, California Trout, Idaho Rivers United (represented by Western Environmental Law Center)
- Defendant Intervenors:
  - American Petroleum Institute
  - Interstate Natural Gas Association of America
  - National Hydropower Association
  - Arkansas

- Louisiana
- Mississippi
- Missouri
- Montana
- Texas
- West Virginia
- Wyoming

***Delaware Riverkeeper Network v. U.S. EPA***, 2:20-cv-03412 (E.D. PA)

- Plaintiffs:
  - Delaware Riverkeeper Network
  - Delaware Riverkeeper, Maya Van Rossum
- Defendant Intervenors:
  - American Petroleum Institute
  - Interstate Natural Gas Association of America
  - National Hydropower Association
  - Arkansas
  - Louisiana
  - Mississippi
  - Missouri
  - Montana
  - Texas
  - West Virginia
  - Wyoming

***South Carolina Costal Conservation League v. U.S. EPA***, No. 2:20-cv-03062-BHH

- Plaintiffs (represented by Southern Environmental Law Center): Marianne, Dimple
  - South Carolina Costal Conservation Leauge
  - NRDC (pledge waiver)
  - Amigos Bravos
  - Savannah Riverkeeper
  - Waterkeeper Alliance
  - South Carolina Native Plant Society
- Defendant Intervenors:
  - American Petroleum Institute
  - Interstate Natural Gas Association of America
  - National Hydropower Association
  - Arkansas
  - Louisiana
  - Mississippi
  - Missouri
  - Montana
  - Texas
  - West Virginia
  - Wyoming

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Thursday, April 22, 2021 6:17 PM

**To:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto: Priest.Andrea@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto: Messier.Dawn@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto: clarke.victoria@epa.gov)>

**Subject:** RE: Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Hi Andrea,

The short answer is maybe. With regard to NRDC, you may now engage with Marianne Engelman-Lado on specific party matters, even if NRDC is a party, so long as she has no other restrictions. Attached you will find the waiver that Jim Payne recently signed a waiver, after consultation with the White House, to permit Marianne to work personally and substantially on certain matters even if NRDC is a party or represents a party, provided that: (a) she did not previously participate in those same specific party matters prior to joining EPA, and (b) she is not otherwise recused from participation, such as if another one of her former employers is present or she has a financial conflict of interest. We have not yet finalized any recusal statement for her, so I can't yet give you a full list of her recusals, but it's fairly robust. If you can tell us who all the parties are in the litigation (you do not need to include *amicus* filings) for the CWA 401 certification rule, we will be able to give you a definitive answer about her involvement.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Priest, Andrea <[Priest.Andrea@epa.gov](mailto: Priest.Andrea@epa.gov)>

**Sent:** Thursday, April 22, 2021 3:02 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto: Fugh.Justina@epa.gov)>

**Cc:** Messier, Dawn <[Messier.Dawn@epa.gov](mailto: Messier.Dawn@epa.gov)>

**Subject:** Recusal Question for Marianne- CWA 401 Certification Rule Litigation

Hi Justina,

I wanted to check in with you about a recusal question for Marianne from the WLO. For the litigation on the CWA 401 Certification Rule, we have a "double recusal" situation in OGC where both Dimple and Melissa are recused from involvement in the litigation due to their prior work, as NRDC and MA are each involved as parties to one of the several cases challenging the 401 Certification Rule. As a result, we have been working with Jim Payne as our OGC FO contact on these cases. However, we were recently advised that Marianne may not be recused from all of the matters in which NRDC is a party. We wanted to check in with you about Marianne's recusal status, and whether we would be able to involve Marianne in discussions regarding the 401 Certification Rule litigation (either for all of the cases or just for the cases in which NRDC is not a party). Is this a possibility for any of the 401 Certification Rule cases?

Thanks, we appreciate your help in sorting this all out! Please let me know if I can provide any additional information on this.

-Andrea

Andrea Priest

Water Law Office

Office of General Counsel

U.S. Environmental Protection Agency

(202) 564-4914



**From:** [Igoe, Sheila](#)  
**To:** [Fugh, Justina](#); [Srinivasan, Gautam](#); [Orlin, David](#)  
**Cc:** [Clarke, Victoria](#)  
**Subject:** RE: Recusal question for Melissa  
**Date:** Wednesday, February 10, 2021 10:18:48 AM

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Justina

Thank you for your quick answers! Sorry to bother you again, but I have one very specific question about this briefing. We have decided (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Sheila Igoe | US EPA | Office of General Counsel | Air and Radiation Law Office | phone: (202) 564-5513

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**From:** Fugh, Justina <Fugh.Justina@epa.gov>  
**Sent:** Tuesday, February 09, 2021 9:14 PM  
**To:** Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Orlin, David <Orlin.David@epa.gov>  
**Cc:** Clarke, Victoria <clarke.victoria@epa.gov>; Igoe, Sheila <Igoe.Sheila@epa.gov>  
**Subject:** RE: Recusal question for Melissa

Hi,

Melissa's recusal is focused on what we call a "specific party" matter, meaning the litigation itself. She is not recused from discussions about "particular matters of general applicability," such as rulemaking focused on a discrete sector of industry, or from "matters," such as how much PM should be regulated in the air that we breathe. From our nerdy ethics perspective, we don't care why the suit was filed or what it's about. It is the suit – and only that lawsuit – from which she is recused in this situation, and the reason is her bar rules. Because she worked on that lawsuit, she is prohibited by her bar rules from now "switching sides" to participate on behalf of EPA on that suit and also from sharing any client confidences. So her recusal relates to that case, but not to the reason the case was brought in the first place. Whatever EPA does now about (b) (5) (the subject matter of the litigation) is not a "specific party matter" and Melissa may participate fully in the direction that EPA wants to go *so long as she is not involved in discussions about the litigation itself*, including the legal risks to that case about policy decision A, B or C. She can still participate in making those policy decisions, but you can't involve her in applying them to the case from which she is recused. If the discussion you envision about (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

(b) (5)

You asked: If there is litigation from which Melissa is recused over a prior action, (b) (5)

? The answer to that question is yes, ARLO may discuss with Melissa the various legal risks associated with making policy decisions about the direction that EPA now will go regarding (b) (5), but you can't talk about how those risks will apply to the specific case from which she is recused.

Would it be helpful to talk together to sift through the details?

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>

**Sent:** Tuesday, February 09, 2021 7:10 PM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>; Orlin, David <[Orlin.David@epa.gov](mailto:Orlin.David@epa.gov)>

**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Igoe, Sheila <[Igoe.Sheila@epa.gov](mailto:Igoe.Sheila@epa.gov)>

**Subject:** RE: Recusal question for Melissa

More follow up from me on ethics. I can't get enough. An initial question in this endeavor is (b) (5)

Do you have further guidance on the recusal line here? If there is litigation from which Melissa is recused over a prior action, (b) (5)

I may have just typed up a word salad here, so let me know if I need to clarify. Thanks as always.

+++++

(202) 564-5647 (o)

(202) 695-6287 (c)

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Tuesday, February 9, 2021 12:22 PM

**To:** Orlin, David <[Orlin.David@epa.gov](mailto:Orlin.David@epa.gov)>

**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Igoe, Sheila <[Igoe.Sheila@epa.gov](mailto:Igoe.Sheila@epa.gov)>

**Subject:** RE: Recusal question for Melissa

Hi David,

Yes, you may talk to her about: (a) the briefing with Joe Goffman and its purpose, (b) (b) (5) and (c) the history of how you got to where you are. Whether you may provide her with all the details of the "potential pathways and considerations" is more problematic ... please don't talk to her about the litigation options or strategy.

Justina

---

**From:** Orlin, David <[Orlin.David@epa.gov](mailto:Orlin.David@epa.gov)>

**Sent:** Tuesday, February 09, 2021 11:31 AM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Igoe, Sheila <[Igoe.Sheila@epa.gov](mailto:Igoe.Sheila@epa.gov)>

**Subject:** Recusal question for Melissa

Hi Justina,

We have our weekly with Melissa today at 12:30 and we were going to note for Melissa that the program is briefing Joe Goffman this week about (b) (5) but we are wondering whether we should be briefing Melissa on this topic given she is recused from the litigation over (b) (5)

I understand that Melissa would be recused from discussion over litigation strategy related to the (b) (5), and I believe she would not be recused from questions arising (b) (5)

(b) (5) The question is whether she is recused from discussions about (b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5) ?

Thanks,

David Orlin

U.S. EPA, Office of General Counsel

(202) 564-1222



**From:** [Hambright, Rosemary](#)  
**To:** [Fugh, Justina](#); [Griffo, Shannon](#)  
**Cc:** [Schramm, Daniel](#)  
**Subject:** RE: recusal questions  
**Date:** Sunday, March 21, 2021 7:04:43 PM

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Hello all,

I am not sure we discussed on Friday the relationship between (b) (5) [REDACTED]  
[REDACTED]  
[REDACTED]. I'm cc'ing Dan and hope we can all discuss at some point next week after you both return to the office on Tuesday.

Thanks!

**Rosemary E. Hambright**

Attorney-Adviser  
US EPA Office of General Counsel | Air & Radiation Law Office  
(202) 564-8829 | WJCN 7519C | mail code: 2344A

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**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Sent:** Thursday, March 18, 2021 10:22 PM  
**To:** Hambright, Rosemary <[Hambright.Rosemary.E@epa.gov](mailto:Hambright.Rosemary.E@epa.gov)>  
**Cc:** Griffo, Shannon <[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)>  
**Subject:** RE: recusal questions

Hi Rosemary,

Recusal issues are challenging and must be determined based on full knowledge of the facts.

Yes, there is additional information that we will need, but we can start by having you set up a call with us. Shannon and I are both working Friday, both off on Monday, and then back at work on Tuesday for the rest of next week.

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

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**From:** Hambright, Rosemary <[Hambright.Rosemary.E@epa.gov](mailto:Hambright.Rosemary.E@epa.gov)>  
**Sent:** Thursday, March 18, 2021 4:34 PM  
**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** recusal questions

Hello Justina,

I'm hoping for some advice on a bit of a recusal puzzle. EPA has two complaints and one NOI related to similar claims. (b) (5)

. The client office is OAR.

1. Complaint from Northeastern States, including Massachusetts
  - a. Melissa Hoffer in OGC is recused
2. Complaint from Our Children's Earth Foundation
3. NOI from Earthjustice on behalf of multiple NGOs, including NRDC and EDF
  - a. Dimple Chaudhary in OGC is recused
  - b. Marianne Engelman-Lado in OGC is recused
  - c. Tomas Carbonell in OAR is recused

(b) (5)

?

Please let me know if I need to provide any additional information.

**Rosemary E. Hambright**

Attorney-Adviser

US EPA Office of General Counsel | Air & Radiation Law Office

(202) 564-8829 | WJCN 7519C | mail code: 2344A

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**From:** [Anderson, Steve](#)  
**To:** [Clarke, Victoria](#)  
**Cc:** [Cole, Joseph E.](#); [Kaczmarek, Chris](#); [Gsell, Alyssa](#)  
**Subject:** RE: recusal/pledge check  
**Date:** Monday, April 05, 2021 11:02:19 AM

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That is correct; thank you again.

Steve Anderson | he/him/his | 202.564.3137

Attorney-Advisor | Pesticides and Toxic Substances Law Office

U.S. EPA Office of General Counsel | [anderson.steve@epa.gov](mailto:anderson.steve@epa.gov)

---

**From:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Sent:** Monday, April 5, 2021 10:55 AM

**To:** Anderson, Steve <[Anderson.Steve@epa.gov](mailto:Anderson.Steve@epa.gov)>

**Cc:** Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>; Kaczmarek, Chris <[Kaczmarek.Chris@epa.gov](mailto:Kaczmarek.Chris@epa.gov)>; Gsell, Alyssa <[Gsell.Alyssa@epa.gov](mailto:Gsell.Alyssa@epa.gov)>

**Subject:** RE: recusal/pledge check

Hi Steve,

I don't see NRDC as a party (for Dimple) or Massachusetts (for Melissa) as parties on this case or prior to consolidation – neither were previously involved in this matter, correct? If it is true that neither NRDC nor Massachusetts were involved, then you could speak to either Dimple or Melissa about this matter.

Victoria

Victoria Clarke

Attorney-Advisor

U.S. Environmental Protection Agency

Office of General Counsel

Washington, D.C. | 7348 WJCN

EPA Office: 202-564-1149

EPA Cell: 202-336-9101

---

**From:** Anderson, Steve <[Anderson.Steve@epa.gov](mailto:Anderson.Steve@epa.gov)>

**Sent:** Monday, April 05, 2021 10:41 AM

**To:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Cc:** Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>; Kaczmarek, Chris <[Kaczmarek.Chris@epa.gov](mailto:Kaczmarek.Chris@epa.gov)>; Gsell, Alyssa <[Gsell.Alyssa@epa.gov](mailto:Gsell.Alyssa@epa.gov)>

**Subject:** RE: recusal/pledge check

Good morning Victoria,

I wanted to confirm recusal/pledge status on one more of my lead cases. We believe Marianne to have a recusal/pledge issue (due to the involvement of Sierra Club), but that neither Melissa nor Dimple do. I do not believe they do based on the conflicts I've heard about for them, but wanted to check.

Please let me know if I can provide any other helpful details.

Thanks in advance!

//

*New York City Coalition to End Lead Poisoning, et al v. EPA* (DC Cir. No. 08-1235)

- Petitions were filed in the 9th circuit (08-1258 – Sierra Club, Center for Environmental Health and Linda Kite); the 2nd circuit (08-1235 – New York City Coalition to End Lead Poisoning, Make the Road to New York, New York Public Interest Group and Northern Manhattan

- Improvement Corp.); and in DC (08-1193 – National Association of Home Builders (NAHB)).
- The cases were consolidated in the DC Circuit.
  - Current Parties: Sierra Club; Center for Environmental Health; Linda Kite; New York City Coalition to End Lead Poisoning; Make the Road to New York; New York Public Interest Research Group; and Northern Manhattan Improvement Corporation
    - Attorney: Tom Neltner, on behalf of the Sierra Club group; Michael J. Chachere, on behalf of the NY group
  - Withdrawn Party: National Association of Home Builders (NAHB)

Steve Anderson | he/him/his | 202.564.3137

Attorney-Advisor | Pesticides and Toxic Substances Law Office

U.S. EPA Office of General Counsel | [anderson.steve@epa.gov](mailto:anderson.steve@epa.gov)

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**From:** Anderson, Steve

**Sent:** Thursday, March 25, 2021 9:10 AM

**To:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Cc:** Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>; Kaczmarek, Chris <[Kaczmarek.Chris@epa.gov](mailto:Kaczmarek.Chris@epa.gov)>; Gsell, Alyssa <[Gsell.Alyssa@epa.gov](mailto:Gsell.Alyssa@epa.gov)>

**Subject:** RE: recusal/pledge check

Thank you! And thanks in particular about the heads up for WE ACT for Environmental Justice—good to know for other cases.

Steve Anderson | he/him/his | 202.564.3137

Attorney-Advisor | Pesticides and Toxic Substances Law Office

U.S. EPA Office of General Counsel | [anderson.steve@epa.gov](mailto:anderson.steve@epa.gov)

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**From:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Sent:** Thursday, March 25, 2021 9:09 AM

**To:** Anderson, Steve <[Anderson.Steve@epa.gov](mailto:Anderson.Steve@epa.gov)>

**Cc:** Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>; Kaczmarek, Chris <[Kaczmarek.Chris@epa.gov](mailto:Kaczmarek.Chris@epa.gov)>; Gsell, Alyssa <[Gsell.Alyssa@epa.gov](mailto:Gsell.Alyssa@epa.gov)>

**Subject:** RE: recusal/pledge check

Hi Steve,

Thanks for checking in. Melissa's conflict with is the state of Massachusetts and Dimple's is with NRDC. Neither of those entities looks to be a party to either litigation.

Victoria

Victoria Clarke

Attorney-Advisor

U.S. Environmental Protection Agency

Office of General Counsel

Washington, D.C. | 7348 WJCN

EPA Office: 202-564-1149

EPA Cell: 202-336-9101

---

**From:** Anderson, Steve <[Anderson.Steve@epa.gov](mailto:Anderson.Steve@epa.gov)>

**Sent:** Thursday, March 25, 2021 8:25 AM

**To:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>

**Cc:** Cole, Joseph E. <[cole.josephe@epa.gov](mailto:cole.josephe@epa.gov)>; Kaczmarek, Chris <[Kaczmarek.Chris@epa.gov](mailto:Kaczmarek.Chris@epa.gov)>; Gsell, Alyssa <[Gsell.Alyssa@epa.gov](mailto:Gsell.Alyssa@epa.gov)>

**Subject:** recusal/pledge check

Good morning Victoria,

In my two cases below, we believe Marianne to have a recusal/pledge issue (due to the involvement of Sierra Club and Earthjustice (*VKC: And don't forget WE ACT for Environmental Justice*)). However, I wanted to confirm with you that neither Melissa nor Dimple do. I do not believe they do based on the conflicts I've heard about for them, but wanted to check.

The parties and representation is the same in each case. Please let me know if I can provide any other helpful details.

Thanks in advance!

//

*A Community Voice, et al v. EPA* (9th Cir. No. 19-71930)

- Parties: A Community Voice; California Communities Against Toxics; Healthy Homes Collaborative; New Jersey Citizen Action; New York City Coalition to End Lead Poisoning; Sierra Club; United Parents Against Lead National; We Act for Environmental Justice
  - Attorney: Earthjustice (Jonathan J. Smith, Eve C. Gartner, Sophia B. Jayanty)
- No intervenors

*A Community Voice, et al v. EPA* (9th Cir. No. 21-70080)

- Parties: A Community Voice; California Communities Against Toxics; Healthy Homes Collaborative; New Jersey Citizen Action; New York City Coalition to End Lead Poisoning; Sierra Club; United Parents Against Lead National; We Act for Environmental Justice
  - Attorney: Earthjustice (Jonathan J. Smith, Eve C. Gartner, Sophia B. Jayanty)
- No intervenors

Steve Anderson | he/him/his | 202.564.3137

Attorney-Advisor | Pesticides and Toxic Substances Law Office

U.S. EPA Office of General Counsel | [anderson.steve@epa.gov](mailto:anderson.steve@epa.gov)

**From:** [Griffo, Shannon](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Clarke, Victoria](#)  
**Subject:** RE: your thoughts, please  
**Date:** Monday, April 26, 2021 1:30:36 PM

---

I would say (b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Shannon Griffo  
Office of General Counsel, Ethics Office  
U.S. Environmental Protection Agency  
(202) 564-7061  
[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)

---

**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Sent:** Monday, April 26, 2021 12:54 PM  
**To:** Griffo, Shannon <[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)>  
**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>  
**Subject:** your thoughts, please

Hi Shannon,

(b) (5)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] What do you think?

Justina

**From:** [Fugh, Justina](#)  
**To:** [Mosley, Ferne](#); [Ross, Margaret](#); [Clarke, Victoria](#)  
**Cc:** [Griffo, Shannon](#)  
**Subject:** RE: I need some help with a 278 question  
**Date:** Wednesday, March 31, 2021 11:45:37 AM

Thanks, Margaret and Ferne! I've notified Melissa.

**From:** Mosley, Ferne <mosley.ferne@epa.gov>  
**Sent:** Wednesday, March 31, 2021 11:27 AM  
**To:** Ross, Margaret <Ross.Margaret@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>; Clarke, Victoria <clarke.victoria@epa.gov>  
**Cc:** Griffo, Shannon <Griffo.Shannon@epa.gov>  
**Subject:** RE: I need some help with a 278 question

I agree – (b) (5), (b) (6)

Ferne  
*Ferne L. Mosley, Attorney-Adviser*  
U.S. Environmental Protection Agency  
Ethics Office/Office of General Counsel  
William Jefferson Clinton Building North, Room 4113A  
1200 Pennsylvania Ave, NW  
Washington, DC 20460  
(202) 564-8046 (desk)  
(202) 306-2998 (mobile)  
[mosley.ferne@epa.gov](mailto:mosley.ferne@epa.gov)

**From:** Ross, Margaret <[Ross.Margaret@epa.gov](mailto:Ross.Margaret@epa.gov)>  
**Sent:** Wednesday, March 31, 2021 11:20 AM  
**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>; Mosley, Ferne <[mosley.ferne@epa.gov](mailto:mosley.ferne@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>  
**Cc:** Griffo, Shannon <[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)>  
**Subject:** RE: I need some help with a 278 question

[illegible]

(b) (6), (b) (5)

?

Best,

Margaret

**Margaret Ross** | Ethics Officer | Office of General Counsel | US EPA | William Jefferson Clinton Federal Building Room 4310A North | Washington, DC 20460 (for ground deliveries: 20004) | phone 202-564-3221 | [Visit us online!](#)

---

**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Sent:** Wednesday, March 31, 2021 10:56 AM

**To:** Mosley, Ferne <[mosley.ferne@epa.gov](mailto:mosley.ferne@epa.gov)>; Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Ross, Margaret <[Ross.Margaret@epa.gov](mailto:Ross.Margaret@epa.gov)>

**Cc:** Griffo, Shannon <[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)>

**Subject:** I need some help with a 278 question

Hi,

Last night, I talked to Melissa Hoffer about her 278. (b) (6)

Here's the question. (b) (6), (b) (5)

Justina



**From:** [Griffo, Shannon](#)  
**To:** [Fugh, Justina](#)  
**Subject:** draft impartiality determination for Melissa Hoffer  
**Date:** Wednesday, January 27, 2021 10:10:00 AM  
**Attachments:** [Melissa Hoffer draft impartiality determination 1\\_26\\_21.docx](#)

---

Here is the draft impartiality determination for Melissa. A few things to highlight when you're reviewing:

- (b) (5) [REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]

Thanks,  
Shannon  
Shannon Griffo  
Office of General Counsel, Ethics Office  
U.S. Environmental Protection Agency  
(202) 564-7061  
[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)

**From:** [Griffo, Shannon](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Clarke, Victoria](#)  
**Subject:** Melissa"s draft flowchart  
**Date:** Wednesday, February 24, 2021 9:50:00 AM  
**Attachments:** [Melissa Hoffer recusal flowchart.docx](#)

---

Here's one for Melissa. I feel like I'm missing something though....

Thanks,  
Shannon

Shannon Griffo  
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U.S. Environmental Protection Agency  
(202) 564-7061  
[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)

**From:** [Griffo, Shannon](#)  
**To:** [Fugh, Justina](#)  
**Cc:** [Clarke, Victoria](#)  
**Subject:** RE: one more look at the imp det for Hoffer (all things MA)  
**Date:** Monday, February 01, 2021 10:48:00 AM  
**Attachments:** [Impartiality determination for Massachusetts 2-1-21\\_SG.docx](#)

---

Made only minor changes. See Track Changes. Two outstanding items: (b) (5)

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U.S. Environmental Protection Agency  
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[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)

---

**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Sent:** Sunday, January 31, 2021 6:14 PM  
**To:** Griffo, Shannon <[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)>  
**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>  
**Subject:** one more look at the imp det for Hoffer (all things MA)

Shannon,

Thanks for drafting this determination. As to your points:

- (b) (5)
- 
- 
- 

If you're working on Monday, please read through to be sure we caught all typos, etc. If you're not working, then I've copied Victoria so she can do that for me instead.

Thanks again,

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

---

**From:** Griffo, Shannon <[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)>

**Sent:** Wednesday, January 27, 2021 10:11 AM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** draft impartiality determination for Melissa Hoffer

Here is the draft impartiality determination for Melissa. A few things to highlight when you're reviewing:

- (b) (5) [REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]

Thanks,

Shannon

Shannon Griffo

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U.S. Environmental Protection Agency

(202) 564-7061

[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)

**From:** [Fugh, Justina](#)  
**To:** [Griffo, Shannon](#)  
**Cc:** [Clarke, Victoria](#)  
**Subject:** RE: one more look at the imp det for Hoffer (all things MA)  
**Date:** Tuesday, February 02, 2021 12:05:50 AM  
**Attachments:** [Impartiality determination for Massachusetts.pdf](#)

---

Hi,

Thanks for your eagle eye. (b) (5), so I'm glad you brought it up. I changed the text to read as follows: Your participation as part of your official duties as Acting General Counsel, or as Principal Deputy General Counsel if you should revert back to those duties within the year, in such matters will be of importance to the Acting Administrator and the confirmed Administrator and, therefore, is in the Agency's interests. In these situations, it may not be appropriate to reassign the matter to another employee.

(b) (5)

Thanks!

justina

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---

**From:** Griffo, Shannon <Griffo.Shannon@epa.gov>  
**Sent:** Monday, February 01, 2021 10:49 AM  
**To:** Fugh, Justina <Fugh.Justina@epa.gov>  
**Cc:** Clarke, Victoria <clarke.victoria@epa.gov>  
**Subject:** RE: one more look at the imp det for Hoffer (all things MA)  
Made only minor changes. See Track Changes. Two outstanding items: (b) (5)

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---

**From:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Sent:** Sunday, January 31, 2021 6:14 PM  
**To:** Griffo, Shannon <[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)>  
**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>  
**Subject:** one more look at the imp det for Hoffer (all things MA)

Shannon,

Thanks for drafting this determination. As to your points:

- (b) (5)
  - (b) (5)
- (b) (5)

(b) (5) [REDACTED]  
[REDACTED]  
◦ [REDACTED]  
[REDACTED]  
[REDACTED]  
• [REDACTED]  
[REDACTED]  
◦ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

If you're working on Monday, please read through to be sure we caught all typos, etc. If you're not working, then I've copied Victoria so she can do that for me instead.

Thanks again,

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

---

**From:** Griffio, Shannon <[Griffio.Shannon@epa.gov](mailto:Griffio.Shannon@epa.gov)>

**Sent:** Wednesday, January 27, 2021 10:11 AM

**To:** Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>

**Subject:** draft impartiality determination for Melissa Hoffer

Here is the draft impartiality determination for Melissa. A few things to highlight when you're reviewing:

- (b) (5) [REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]

Thanks,

Shannon

Shannon Griffio

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U.S. Environmental Protection Agency

(202) 564-7061

[Griffio.Shannon@epa.gov](mailto:Griffio.Shannon@epa.gov)

**From:** [Fugh, Justina](#)  
**To:** [Griffo, Shannon](#)  
**Cc:** [Clarke, Victoria](#)  
**Subject:** one more look at the imp det for Hoffer (all things MA)  
**Date:** Sunday, January 31, 2021 6:13:49 PM  
**Attachments:** [Impartiality determination for Massachusetts 2-1-21.docx](#)

---

Shannon,

Thanks for drafting this determination. As to your points:

- (b) (5) [REDACTED]  
[REDACTED]
  - [REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]
  - [REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]
  - [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

If you're working on Monday, please read through to be sure we caught all typos, etc. If you're not working, then I've copied Victoria so she can do that for me instead.

Thanks again,

Justina

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**From:** Griffo, Shannon <Griffo.Shannon@epa.gov>

**Sent:** Wednesday, January 27, 2021 10:11 AM

**To:** Fugh, Justina <Fugh.Justina@epa.gov>

**Subject:** draft impartiality determination for Melissa Hoffer

Here is the draft impartiality determination for Melissa. A few things to highlight when you're reviewing:

- (b) (5) [REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]  
[REDACTED]

Thanks,  
Shannon

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and through Attorney General Xavier Becerra  
and the State Water Resources Control Board*

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CINDY CHANG \*  
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Environmental Protection Division  
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Seattle, Washington 98104  
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E-mail: Kelly.Wood@atg.wa.gov  
*Attorneys for Plaintiff State of Washington*

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BRIAN LUSIGNAN \*  
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E-mail: brian.lusignan@ag.ny.gov  
*Attorneys for Plaintiff State of New York*

*[Additional Parties and Counsel Listed on  
Signature Pages]*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**STATE OF CALIFORNIA, BY AND THROUGH  
ATTORNEY GENERAL XAVIER BECERRA AND  
THE STATE WATER RESOURCES CONTROL  
BOARD, STATE OF WASHINGTON, STATE OF  
NEW YORK, STATE OF COLORADO, STATE OF  
CONNECTICUT, STATE OF ILLINOIS, STATE OF  
MAINE, STATE OF MARYLAND,  
COMMONWEALTH OF MASSACHUSETTS, STATE  
OF MICHIGAN, STATE OF MINNESOTA, STATE  
OF NEVADA, STATE OF NEW JERSEY, STATE OF  
NEW MEXICO, STATE OF NORTH CAROLINA,  
STATE OF OREGON, STATE OF RHODE ISLAND,**

Case No.: 3:20-cv-4869

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

(Administrative Procedure Act, 5 U.S.C. §  
551 *et seq.*)

1 **STATE OF VERMONT, COMMONWEALTH OF**  
2 **VIRGINIA, STATE OF WISCONSIN, AND THE**  
3 **DISTRICT OF COLUMBIA,** Plaintiffs,  
4 **v.**  
5 **ANDREW R. WHEELER, IN HIS OFFICIAL**  
6 **CAPACITY AS ADMINISTRATOR OF THE UNITED**  
7 **STATES ENVIRONMENTAL PROTECTION**  
8 **AGENCY, AND THE UNITED STATES**  
9 **ENVIRONMENTAL PROTECTION AGENCY,**  
10 Defendants.

11 Plaintiffs, the States of California, Washington, New York, Colorado, Connecticut,  
12 Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North  
13 Carolina, Oregon, Rhode Island, Vermont, Wisconsin, the Commonwealths of Massachusetts and  
14 Virginia, the District of Columbia, and the California State Water Resources Control Board, by  
15 and through their respective Attorneys General, allege as follows against defendants Andrew R.  
16 Wheeler, in his official capacity as Administrator of the United States Environmental Protection  
17 Agency (EPA), and EPA (collectively, Defendants):

## 18 INTRODUCTION

19 1.1 This lawsuit challenges a final rule issued by the Defendants, entitled “Updating  
20 Regulations on Water Quality Certification,” 85 Fed. Reg. 42,210 (July 13, 2020) (Rule). The  
21 Rule upends fifty years of cooperative federalism by arbitrarily re-writing EPA’s existing water  
22 quality certification regulations to unlawfully curtail state authority under the Clean Water Act,  
23 33 U.S.C. §§ 1251 *et seq.* (CWA or the Act).

24 1.2 The CWA’s primary objective is “to restore and maintain the chemical, physical  
25 and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In achieving that goal,  
26 Congress recognized the critical and important role states play in protecting and enhancing waters  
27 within their respective borders. *Id.* § 1251(b). And, Congress sought to preserve the States’  
28 preexisting and broad authority to protect their waters. To those ends, the Act specifically  
provides that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary  
responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the

1 development and use (including restoration, preservation, and enhancement) of land and water  
2 resources ....” *Id.*

3 1.3 This preservation of state authority is present throughout the Act. Congress  
4 preserved for each State the authority to adopt or enforce the conditions and restrictions the state  
5 deems necessary to protect its state waters, so long as the state does not adopt standards that are  
6 less protective of waters than federal standards. *Id.* § 1370. State standards, including those of the  
7 Plaintiff States, may be and frequently are more protective. And, critical to the current action,  
8 Congress in section 401 of the Act, 33 U.S.C. § 1341 (section 401), expressly authorized States to  
9 independently review the water quality impacts of projects that may result in a discharge and that  
10 require a federal license or permit to ensure that such projects do not violate state water quality  
11 laws.

12 1.4 Where a State denies a water quality certification under section 401, Congress  
13 specifically prohibited federal agencies from permitting or licensing such projects. *Id.* §  
14 1341(a)(1).

15 1.5 Congress also broadly authorized States to include conditions in state certifications  
16 necessary to ensure an applicant’s compliance with any “appropriate requirement of State law.”  
17 *Id.* § 1341(a), (d). The conditions in state certifications must be incorporated as conditions in  
18 federal permits. *Id.* § 1341(d). In this way, section 401 prevents the federal government from  
19 using its licensing and permitting authority to authorize projects that could violate state water  
20 quality laws. *See generally, id.* § 1341.

21 1.6 EPA has long acknowledged and respected the powers preserved for the States in  
22 section 401. In fact, until 2019, EPA’s regulations and every guidance document issued by EPA  
23 for section 401 certifications—spanning three decades and four administrations—expressly  
24 recognized states’ broad authority under section 401 to condition or deny certification of federally  
25 permitted or licensed projects within their borders. The Supreme Court and Circuit Courts of  
26 Appeals have affirmed that broad state authority under section 401.

27 1.7 In April 2019, however, President Trump signed Executive Order 13868, directing  
28 EPA to issue regulations that reduce the purported burdens current section 401 certification

1 requirements place on energy infrastructure project approval and development, thus effectively  
2 prioritizing such projects over water quality protection. Executive Order on Promoting Energy  
3 Infrastructure and Economic Growth, 84 Fed. Reg. 15,495 (Apr. 15, 2019) (Executive Order  
4 13868). EPA issued the Rule pursuant to Executive Order 13868.

5 1.8 The Rule violates the Act and unlawfully usurps state authority to protect the  
6 quality of waters within their borders.

7 1.9 Contrary to the language of section 401, Supreme Court precedent, and EPA's  
8 long-standing interpretation, the Rule prohibits States, including Plaintiff States, from considering  
9 how a federally approved project, as a whole, will impact state water quality, instead unlawfully  
10 limiting the scope of state review and decision-making to point source discharges into narrowly  
11 defined waters of the United States. *Cf. PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*  
12 (*PUD No. 1*), 511 U.S. 700, 711 (1994) ("The language of [Section 401(d)] contradicts  
13 petitioners' claim that the State may only impose water quality limitations specifically tied to a  
14 'discharge'" because the text "allows the State to impose 'other limitations' on the project in  
15 general.").

16 1.10 Similarly, the Rule would unlawfully limit states' review and decision-making  
17 authority under section 401 by allowing only consideration of whether a federally licensed project  
18 will comply with state water quality standards and requirements regulating point source  
19 discharges. But section 401 contains no such limitation, instead broadly authorizing States to  
20 impose any condition necessary to ensure an applicant complies with "any other appropriate  
21 requirement of State law." 33 U.S.C. § 1341(d). Both EPA and the Courts have long recognized  
22 the broad scope of the phrase "appropriate requirement of State law." *See PUD No. 1*, 511 U.S. at  
23 712-13 (Section 401(d) "author[izes] additional conditions and limitations on the activity as a  
24 whole"; these conditions and limitations include "state water quality standards ... [which] are  
25 among the 'other limitations' with which a State may ensure compliance through the § 401  
26 certification process").

27 1.11 The Rule would also interfere with the States' ability to apply their own  
28 administrative procedures to their review of applications for water quality certification, instead

1 imposing onerous federal control over virtually every step of the administrative process. The Rule  
2 requires States to take action within a time limit imposed by the federal permitting agency based  
3 on a minimal list of required information. State agencies appear to be discouraged from obtaining  
4 additional information if that information cannot be developed and provided within that time  
5 limit, even for major infrastructure projects that pose significant risk to a wide variety of state  
6 water resources for decades. Even when a State is able to make a certification decision before the  
7 expiration of the time limit imposed by the federal agency, the federal agency could *still*  
8 determine that the State waived its authority if it concludes that the State failed to provide certain  
9 information to the federal agency required by the Rule. This Federal dictate of state  
10 administrative procedures is fundamentally inconsistent with the cooperative federalism scheme  
11 established by the CWA in general, and with the preservation of broad state authority affirmed by  
12 section 401 in particular.

13 1.12 EPA's departure from 50 years of consistent administrative and judicial precedent  
14 by narrowing state authority under section 401 is contrary to Congress's 1972 enactment of the  
15 CWA, which by its terms expressly preserved state authority by incorporating the language of  
16 section 401 essentially unchanged from its predecessor statute, the Water Quality Improvement  
17 Act of 1970. EPA claims that this drastic change is justified based on its "first holistic analysis of  
18 the statutory text, legislative history, and relevant case law." 85 Fed. Reg. at 42,215. However,  
19 nothing in the text, purpose, or legislative history of section 401, no matter how "holistically"  
20 considered, supports the Rule's substantial infringement on state authority. The Rule unlawfully  
21 interprets a statute that is "essential in the scheme to preserve state authority to address the broad  
22 range of pollution" affecting state waters, *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S.  
23 370, 386 (2006) (*S.D. Warren*), to instead restrict state authority to do so.

24 1.13 By attempting to limit the scope of state section 401 water quality certifications  
25 and by imposing new, unjustified, and unreasonable substantive limits, time constraints, and  
26 procedural restrictions on States' review of and decisions on section 401 certification  
27 applications, the Rule is a radical departure from past EPA policy and practice, is unlawful, and  
28

1 abandons the decades-long successful cooperative federalism approach Congress intended in the  
2 CWA.

3 1.14 As set forth below, the Rule is arbitrary, capricious, an abuse of discretion,  
4 contrary to the CWA and binding precedent, and in excess of EPA's authority under the  
5 Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C). Accordingly, Plaintiff States seek a  
6 declaration that the Rule violates the Clean Water Act and the Administrative Procedure Act, 5  
7 U.S.C. § 551 *et seq.* (APA), and request that the Court set aside and vacate the Rule.

### 8 JURISDICTION AND VENUE

9 2.1 This action raises federal questions and arises under the CWA and the APA. This  
10 Court has jurisdiction over the States' claims pursuant to 28 U.S.C. § 1331 (action arising under  
11 the laws of the United States) and 5 U.S.C. §§ 701-706. An actual controversy exists between the  
12 parties within the meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory,  
13 injunctive, and other relief pursuant to 28 U.S.C. §§ 2201-2202, and 5 U.S.C. §§ 701-706.

14 2.2 The United States has waived sovereign immunity for claims arising under the  
15 APA. 5 U.S.C. § 702.

16 2.3 The States are "persons" within the meaning of 5 U.S.C. § 551(2), authorized to  
17 bring suit under the APA to challenge unlawful final agency action. 5 U.S.C. §§ 701(2), 702.

18 2.4 Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C) because  
19 plaintiff State of California resides within the district and this action seeks relief against federal  
20 agencies and officials acting in their official capacities.

### 21 INTRADISTRICT ASSIGNMENT

22 3.1 Pursuant to Civil Local Rules 3-5(b) and 3-2(c), there is no basis for assignment of  
23 this action to any particular location or division of this Court.

### 24 PARTIES

25 4.1 The Plaintiff States are sovereign states of the United States of America. The  
26 States bring this action in their sovereign and proprietary capacities. As set out below, the Rule  
27 directly harms the States' interests, including, but not limited to, environmental harms, financial  
28 harms that flow from implementing EPA's radical shift in policy, and limits on powers

specifically reserved to the States by Congress in the Act. The States also bring this action as *parens patriae* on behalf of their citizens and residents to protect public health, safety, and welfare, their waters, natural resources, and environment, and their economies.

4.2 Defendant EPA is the federal agency with primary regulatory authority under the Act and bears responsibility, in whole or in part, for the acts complained of in this Complaint.

4.3 Defendant Andrew R. Wheeler is sued in his official capacity as Administrator of the EPA and bears responsibility, in whole or in part, for the acts complained of in this Complaint.

## STATUTORY AND REGULATORY BACKGROUND

### The Administrative Procedure Act

5.1 Federal agencies are required to comply with the APA's rulemaking requirements in amending or repealing a rule.

5.2 Under the APA, a federal agency must publish notice of a proposed rulemaking in the Federal Register and "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b), (c).

5.3 "[R]ule making" means "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5).

5.4 An agency that promulgates a rule that modifies its long-standing policy or practice must articulate a reasoned explanation and rational basis for the modification and must consider and evaluate the reliance interests engendered by the agency's prior position. *See, e.g., Dep't of Homeland Security v. Regents of the University of Ca.*, \_\_\_ S. Ct. \_\_\_, Slip Op. at 23-26 (June 18, 2020); *Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *see also* 5 U.S.C. § 706(2)(C).

5.5 The APA authorizes this Court to "hold unlawful and set aside agency action, findings and conclusions" it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise



not in accordance with law” or taken “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2).

### **The Clean Water Act**

5.6 The Act’s objective is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

5.7 In furtherance of that primary objective, Congress both preserved and enhanced the States’ authority to protect the quality of state waters. The Act provides that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ....” *Id.* § 1251(b). As such, “Congress expressed its respect for states’ role[s] through a scheme of cooperative federalism ....” *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007).

5.8 Congress’s preservation of pre-existing state authority is evident throughout the Act. For example, section 303 of the Act authorizes states, subject to baseline federal standards, to determine the level of water quality they will require and the means and mechanisms through which they will achieve and maintain those levels. 33 U.S.C. § 1313.

5.9 Section 510 of the Act states that “nothing in [the Act] shall ... preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution” as long as such requirements are at least as stringent as the Act. *Id.* § 1370.

5.10 Section 401 of the Act provides that “[a]ny applicant for a Federal license or permit to conduct any activity ... which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.” *Id.* § 1341(a)(1). Section 401(d) broadly states that “[a]ny certification provided ... shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a



1 Federal license or permit will comply with any applicable effluent limitations and other  
 2 limitations ... and with any other appropriate requirement of State law set forth in such  
 3 certification, and shall become a condition on any Federal license or permit subject to the  
 4 provisions of this section.” *Id.* § 1341(d).

5 5.11 The authority reserved to States in section 401 is meaningful and significant. In  
 6 enacting section 401, Congress sought to ensure that all activities authorized by the federal  
 7 government that may result in a discharge would comply with “State law” and that “Federal  
 8 licensing or permitting agencies [could not] override State water quality requirements.” S. Rep.  
 9 92-313, at 69, *reproduced in* 2 Legislative History of the Water Pollution Control Act  
 10 Amendments of 1972 (“Legislative History Vol. 2”), at 1487 (1973).

11 5.12 States’ authority under section 401 to impose conditions on a federally permitted  
 12 or licensed project is not limited to water quality controls specifically tied to a “discharge.”  
 13 Rather, section 401 “allows [states] to impose ‘other limitations’ on the project in general to  
 14 assure compliance with various provisions of the Act and with ‘any other appropriate requirement  
 15 of State law.’” *PUD No. 1*, 511 U.S. at 711. Thus, while section 401(a)(1) “identifies the category  
 16 of activities subject to certification—namely, those with discharges”—section 401(d) authorizes  
 17 additional conditions and limitations “*on the activity as a whole* once the threshold condition, the  
 18 existence of a discharge, is satisfied.” *Id.* at 711-12 (emphasis added). Section 401’s “terms have  
 19 a broad reach, requiring state approval any time a federally licensed activity ‘may’ result in a  
 20 discharge..., and its object comprehends maintaining state water quality standards.” *S.D. Warren*,  
 21 547 U.S. at 380. Furthermore, “Congress intended that [through section 401, States] would retain  
 22 the power to block, for environmental reasons, local water projects that might otherwise win  
 23 federal approval.” *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

24 5.13 The Act imposes only one restriction on the timeframe of state certification review  
 25 and decision-making: if a State “fails or refuses to act on a request for certification, within a  
 26 reasonable period of time (which shall not exceed one year) after receipt of such request, the  
 27 certification requirements of this subsection shall be waived.” 33 U.S.C. § 1341.  
 28

5.14 In the quarter of a century since the Supreme Court’s decision in *PUD No. 1*, Congress has not limited or otherwise amended the language of section 401.

**EPA’s Longstanding Section 401 Regulations and Guidance**

5.15 In 1971, EPA promulgated regulations regarding state water quality certifications pursuant to section 21(b) of the Water Quality Improvement Act of 1970—the CWA’s predecessor (1971 Regulations). *See* 36 Fed. Reg. 22,369, 22,487 (Nov. 25, 1971). Congress carried over the provisions of section 21(b) in section 401 of the CWA of 1972 with only “minor” changes. Senate Debate on S. 2770 (Nov. 2, 1971), *reproduced in* Legislative History Vol. 2 at 1394.

5.16 In the Water Pollution Control Act Amendments of 1972, now known as the Clean Water Act, Congress directed EPA to “promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section [401] of this [Act] or permit application pursuant to section 402 of this [Act].” 33 U.S.C. § 1314(h). This is the only instruction that Congress gave EPA with regards to implementing section 401. EPA did so, as codified in 40 C.F.R. Part 136 (defining the scientific methods for analyzing a wide array of pollutants).

5.17 Following the 1972 amendments and the enactment of section 401, Congress directed EPA to modify other existing regulations but did not direct EPA to revise its existing 1971 Regulations.

5.18 Accordingly, EPA continued to apply the 1971 Regulations to implement section 401 following the CWA’s enactment in 1972.

5.19 Not only does the Rule conflict with the Act’s express protection of state interests under section 401, the Rule is a significant departure from, and contrary to, EPA’s 1971 Regulations.

5.20 Pursuant to EPA’s 1971 Regulations, when issuing a section 401 certification, states are required to include a statement certifying that a permitted “activity,” not just a point source discharge, will comply with water quality standards. *See* former 40 C.F.R. § 121.2(a)(3) (June 7, 1979). Furthermore, “water quality standards” was broadly defined to include standards

1 established pursuant to the CWA, as well as any “State-adopted water quality standards.” *Id.* §  
2 121.1(g).

3 5.21 The 1971 Regulations did not permit federal agencies to determine whether state  
4 denials or conditional certifications met specified requirements and were therefore effective or  
5 not. Moreover, a State could only waive its authority under section 401 if it provided express  
6 written notification of such waiver or failed to act on a certification request within a reasonable  
7 period of time. *Id.* § 121.16(b) (June 7, 1979).

8 5.22 In April 1989, EPA’s Office of Water issued a section 401 certification guidance  
9 document entitled “Wetlands and 401 Certification—Opportunities and Guidelines for States and  
10 Eligible Indian Tribes” (1989 Guidance).

11 5.23 EPA’s 1989 Guidance acknowledged that section 401 “is written very broadly  
12 with respect to the activities it covers.” 1989 Guidance at 20. The 1989 Guidance further stated  
13 that “[a]ny activity, including, but not limited to, the construction or operation of facilities which  
14 may result in any discharge’ requires water quality certification.” *Id.* (emphasis in original). The  
15 1989 Guidance explained that the purpose of the water quality certification requirement in section  
16 401, “was to ensure that no license or permit would be issued for an activity that through  
17 inadequate planning or otherwise could in fact become a source of pollution.” *Id.* at 20.

18 5.24 The 1989 Guidance contemplated broad state review of federally permitted or  
19 licensed projects and stating the “imperative” principle that “all of the potential effects of a  
20 proposed activity on water quality—direct and indirect, short and long term, upstream and  
21 downstream, construction and operation—should be part of a State’s [401] certification review.”  
22 *Id.* at 22, 23. The 1989 Guidance also provided examples of conditions that States had  
23 successfully placed on section 401 certifications. These included watershed management plans,  
24 fish stocking, and noxious weed controls. *Id.* at 24, 54-55. EPA noted that “[w]hile few of these  
25 conditions [were] based on traditional water quality standards, all [were] valid” under section  
26 401. *Id.* at 24. EPA further noted that “[s]ome of the conditions [were] clearly requirements of  
27 State or local law related to water quality other than those promulgated pursuant to the [CWA]  
28 sections enumerated in Section 401(a)(1).” *Id.*

1           5.25   Consistent with the text of section 401 and EPA’s 1971 Regulations, the 1989  
2   Guidance narrowly construed the circumstances under which a State would waive its authority to  
3   review certification requests under section 401: a waiver would be deemed to have occurred only  
4   if a state failed to act within “a reasonable period of time (which shall not exceed one year) after  
5   receipt” of a certification request. *Id.* at 31.

6           5.26   The 1989 Guidance also advised States to adopt regulations requiring that  
7   applicants submit information to ensure informed decision-making. *Id.* Further, the 1989  
8   Guidance encouraged States to “link the timing for review to what is considered a receipt of a  
9   complete application.” *Id.* As an example, EPA cited a Wisconsin regulation requiring a  
10   “complete” application before the agency review time began. *Id.*, citing Wisconsin  
11   Administrative Code, NR 299.04. The 1989 Guidance noted that pursuant to the same Wisconsin  
12   regulation, the state agency would review an application for completeness within 30 days of  
13   receipt and could request any additional information needed to make a certification decision. *Id.*  
14   (currently, these requirements are codified in Wisconsin Administrative Code, NR 299.03).

15          5.27   EPA issued additional section 401 guidance in April 2010 entitled “Clean Water  
16   Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and  
17   Tribes” (2010 Guidance). The 2010 Guidance was consistent with and affirmed EPA’s  
18   longstanding recognition of States’ broad authority preserved under the CWA and enhanced by  
19   section 401.

20          5.28   In the 2010 Guidance, EPA stated that, “[a]s incorporated into the 1972 [CWA], §  
21   401 water quality certification was intended to ensure that no federal license or permit would be  
22   issued that would prevent states or tribes from achieving their water quality goals, or that would  
23   violate [the Act’s] provisions.” 2010 Guidance at 16. Relying on the Supreme Court’s controlling  
24   decision in *PUD No. 1*, the 2010 Guidance confirmed that “once § 401 is triggered, the certifying  
25   state or tribe may consider and impose conditions on the project activity in general, and not  
26   merely on the discharge, if necessary to assure compliance with the CWA and with any other  
27   appropriate requirement of state or tribal law.” *Id.* at 18. For example, EPA explained that “water  
28   quality implications of fertilizer and herbicide use on a subdivision and golf course might be

1 considered as part of a § 401 certification analysis of a CWA § 404 permit that would authorize  
2 discharge of dredged or fill material to construct the subdivision and golf course.” *Id.*

3 5.29 In line with EPA’s long-standing position, the 2010 Guidance maintained an  
4 expansive view of the scope of other state laws appropriately considered under section 401  
5 certification reviews: “It is important to note that, while EPA-approved state and tribal water  
6 quality standards may be a major consideration driving § 401 decision[s], they are not the only  
7 consideration.” *Id.* at 16.

8 5.30 The 2010 Guidance acknowledged that States establish requirements for what  
9 constitutes a complete application and highlighted the fact that the timeframe for state review of a  
10 section 401 certification request “begins once a request for certification has been made to the  
11 certifying agency, *accompanied by a complete application.*” *Id.* at 15-16 (emphasis added).

12 5.31 In the years following EPA’s issuance of its 1989 and 2010 guidance documents,  
13 Congress has neither limited nor otherwise amended the language of section 401.

#### 14 **Executive Order 13868 and Section 401 Certifications**

15 5.32 On April 10, 2019, President Trump issued Executive Order 13868, upending  
16 EPA’s longstanding broad interpretation of state authority to protect water quality under section  
17 401.

18 5.33 Intended to promote and speed infrastructure development, particularly in the coal,  
19 oil, and natural gas sectors, Executive Order 13868 directed EPA to evaluate ways in which  
20 section 401 certifications have “hindered the development of energy infrastructure.” 84 Fed. Reg.  
21 at 15,496. Executive Order 13868 failed to acknowledge the critical role of section 401  
22 certifications to the Act’s primary purpose of restoring and maintaining the chemical, physical,  
23 and biological integrity of the Nation’s waters, and to preserving States’ authority to do so.

24 5.34 Executive Order 13868 directed the EPA Administrator to undertake a number of  
25 actions related to section 401 certifications. First, Executive Order 13868 required the  
26 Administrator, within 60 days, to (1) examine the 2010 Guidance and issue superseding guidance  
27 to States and authorized tribes; and (2) issue guidance to agencies to reduce the burdens on  
28 energy infrastructure projects caused by section 401’s certification requirements. Second,

1 Executive Order 13868 required the Administrator, within 120 days, to review EPA's section 401  
2 regulations for consistency with Executive Order 13868's energy infrastructure and economic  
3 growth goals and publish revised regulations consistent with those goals. Third, Executive Order  
4 13868 required the Administrator to finalize the revised regulations no later than 13 months from  
5 April 10, 2019.

6 5.35 Executive Order 13868 also required all federal agencies that issue licenses or  
7 permits requiring section 401 certification to, within 90 days of the final EPA Rule, "initiate a  
8 rulemaking to ensure their respective agencies' regulations are consistent with" the EPA Rule.  
9 Exec. Order No. 13868, Sec. 3(d).

10 5.36 In response to Executive Order 13868, on June 7, 2019, EPA issued a document  
11 entitled "Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized  
12 Tribes" with a stated purpose of facilitating implementation of Executive Order 13868 (2019  
13 Guidance). The 2019 Guidance attempted to impose substantially shorter timeframes for, and  
14 narrow the permissible scope of, state review. Although the 2019 Guidance was issued without  
15 notice and opportunity for comment, all of the Plaintiff States submitted a letter to EPA objecting  
16 to the guidance. Concurrently, the EPA Administrator informed the States he was withdrawing and  
17 rescinding the 2010 Guidance.

18 5.37 On August 22, 2019, EPA published the proposed Rule in the Federal Register  
19 with only a 60-day public comment period that closed on October 21, 2019. 84 Fed. Reg. 44,080.

20 5.38 Along with the proposed Rule, EPA published its "Economic Analysis for the  
21 Proposed Clean Water Act Section 401 Rulemaking" (Economic Analysis). In keeping with  
22 Executive Order 13868, the 23-page Economic Analysis focused largely on the economic effects  
23 of states' section 401 certification conditions and denials for the energy industry projects.

24 5.39 The Economic Analysis failed to consider the potential economic impacts from  
25 decreased water quality caused by the Rule's limitations on the scope of States' section 401  
26 authority.

27 5.40 EPA held public hearings on the proposed Rule on September 5, 2019, and  
28 September 6, 2019, in Salt Lake City, Utah. Several Plaintiff States gave oral testimony at the

1 public hearings, including Washington and New York. Plaintiff States also submitted written  
2 comments on the proposed Rule on October 17 and 21, 2019.

### 3 **The Final Section 401 Rule**

4 5.41 On June 1, 2020, EPA released a pre-publication version of the final Rule, entitled  
5 “Clean Water Act Section 401 Certification Rule.” In announcing the final Rule, the  
6 Administrator stated that EPA was “following through on President Trump’s Executive Order to  
7 curb abuses of the Clean Water Act that have held our nation’s energy infrastructure projects  
8 hostage, and to put in place clear guidelines that finally give these projects a path forward.”<sup>1</sup>

9 5.42 On July 13, 2020, EPA published the final Rule in the Federal Register. 85 Fed.  
10 Reg. 42,210. By its terms, the Rule becomes effective 60 days following the publication date.

11 5.43 The final Rule is a radical departure from prior EPA policy and practice regarding  
12 section 401, drastically curtailing state authority under section 401 in a way that is contrary to: (1)  
13 the plain language, structure, purpose, and legislative history of the CWA; (2) binding Supreme  
14 Court precedent interpreting section 401; and (3) EPA’s own guidance on section 401, which  
15 spans decades and multiple administrations, resulting in significant reliance by the States.  
16 Moreover, the Rule unlawfully limits States’ section 401 authority.

17 5.44 The Rule asserts, without rational basis, that it will reduce regulatory uncertainty  
18 and increase predictability for States, tribes and project proponents. 85 Fed. Reg. at 42,236,  
19 42,242. The Rule conflicts with the CWA’s text, structure, purpose, and intent, as well as  
20 longstanding agency guidance and controlling precedent, and forces the States to amend their  
21 own section 401 laws. As a result, the Rule will in fact cause increased confusion and uncertainty  
22 that will ensue while the States attempt to revise their statutes and regulations related to section  
23 401 and the States, federal agencies, and project proponents litigate and attempt to implement and  
24 comply with the Rule’s requirements.

25  
26  
27  
28 <sup>1</sup> <https://www.epa.gov/newsreleases/epa-issues-final-rule-helps-ensure-us-energy-security-and-limits-misuse-clean-water-0>



Limits on Scope of Section 401 Certification Review

5.45 The Rule unlawfully limits the applicability and scope of section 401 certifications to impacts from specific, point source discharges to waters of the United States, thus prohibiting States from conditioning water quality certifications to assure the effects of the project as a whole do not violate water quality standards. 85 Fed. Reg. 42,285 (to be codified at 40 C.F.R. §§ 121.1; 121.3).

5.46 Confining the scope of section 401 certification to point source discharges is contrary to the Act’s plain language and the Supreme Court’s decision in *PUD No. 1*. In *PUD No. 1*, the Supreme Court held that, while section 401(a)(1) “identifies the category of activities subject to certification—namely, those with discharges”—section 401(d) “is most reasonably read as authorizing additional conditions and limitations on *the activity as a whole* once the threshold condition, the existence of a discharge, is satisfied.” *Id.* at 711-12 (emphasis added).

5.47 EPA acknowledges that the Rule departs from the controlling precedent in *PUD No. 1*, see, e.g., 85 Fed. Reg. at 42,231, but asserts that *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967 (2005) (*Brand X*) allows EPA to effectively overrule the Supreme Court’s *PUD No. 1* decision. *Brand X*, however, does not permit EPA to overrule binding Supreme Court precedent or adopt an interpretation that is not in accordance with the law.

5.48 In limiting the scope of section 401 certifications to impacts from specific, point source discharges, the Rule abandons without a rational explanation EPA’s previous position articulated in the 1989 Guidance that “it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.” 1989 Guidance at 22. Similarly, the Rule abandons without a rational explanation EPA’s position set forth in the 2010 Guidance that “the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA and with any other appropriate requirement of state or tribal law.” 2010 Guidance at 18.



1 Limits on Appropriate Requirements of State Law

2 5.49 In direct conflict with the Act's language and Congressional intent, the Rule also  
3 unlawfully limits the term "other appropriate requirements of State law" in Section 401(d) to  
4 "water quality requirements," newly defined as the "applicable provisions of §§ 301, 302, 303,  
5 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source  
6 discharges into waters of the United States." *See* 85 Fed. Reg. at 42232 (to be codified as 40  
7 C.F.R. § 121.1(n))

8 5.50 By restricting the definition of "water quality requirements," the Rule potentially  
9 excludes a broad range of state and tribal law directly applicable to water quality that has been  
10 used for decades to evaluate and condition federally licensed or permitted projects.

11 5.51 In limiting "water quality requirements" only to specified provisions of the Act  
12 and those state and tribal laws related to "point source discharges," the Rule not only abandons  
13 but runs contrary to EPA's longstanding position that "[t]he legislative history of [section 401]  
14 indicates that the Congress meant for the States to impose whatever conditions on [federally  
15 permitted projects] are necessary to ensure that an applicant complies with all State requirements  
16 that are related to water quality concerns." 1989 Guidance at 23.

17 5.52 The Rule also departs from EPA's longstanding position that "[t]he legislative  
18 history of Section 401(d) indicates that Congress meant for the States to condition certifications  
19 on compliance with any State and local law requirements related to water quality preservation"  
20 and that "conditions that relate in any way to water quality maintenance are appropriate." *Id.* at  
21 25-26.

22 5.53 EPA fails to provide a rational explanation for its complete departure from its  
23 longstanding interpretation of section 401. With its sudden departure from an established  
24 regulatory approach, EPA also failed to consider the reliance interests of states that have  
25 developed section 401 certification procedures and water quality control programs in reliance on  
26 EPA's prior, longstanding interpretation of section 401.

1 Restrictions on Certification Request Process

2 5.54 The Rule also sets out new procedures for the submission and evaluation of section  
3 401 certification requests. These procedures plainly conflict with the CWA’s text and purpose.

4 5.55 Prior to the Rule, the States or other certifying authorities and EPA together  
5 determined the types of information an applicant was required to submit in a section 401  
6 certification request. In contrast, the Rule enumerates an insufficient and minimal list of  
7 information project proponents are directed to provide in a section 401 certification application.  
8 *Compare* 40 C.F.R. § 121.3 (June 7, 1979), *with* 85 Fed. Reg. at 42,285 (to be codified as 40  
9 C.F.R. § 121.5). Contrary to *PUD No. 1*, the Rule does not require project applicants to provide  
10 information related to the water quality impacts caused by the proposed activity as a whole.  
11 Rather, the Rule merely requires each applicant to identify the “location and nature” of potential  
12 discharges and the “methods and means” by which the discharge(s) will be monitored and  
13 managed, along with other, limited information. 85 Fed. Reg. at 42,285 (to be codified as 40  
14 C.F.R. § 121.5f(b)-(c)).

15 5.56 Although the Rule allows States and other certifying authorities to request  
16 additional information from project applicants, EPA attempts to limit this in the Preamble by  
17 suggesting that—regardless of whether such information is sufficient to fully evaluate water  
18 quality impacts—the requested information is to be limited to whatever can be “produced and  
19 evaluated within the reasonable time.” 85 Fed. Reg. at 42,246.

20 5.57 The Rule also sets out a procedure whereby federal agencies must establish a  
21 “reasonable period of time” by which certifying authorities must act on requests for section 401  
22 certifications, either categorically or on a case-by-case basis. 85 Fed. Reg. at 42,285-286 (to be  
23 codified as 40 C.F.R. § 121.6). Pursuant to the Rule, this time period cannot exceed one year  
24 under any circumstances. *Id.* (to be codified as 40 C.F.R. § 121.6(a)). Moreover, this reasonable  
25 time period is to be measured from the certifying authority’s “receipt” of the certification request,  
26 rather than the certifying authority’s receipt of the complete certification application. *Id.* at 42,285  
27 (to be codified as 40 C.F.R. § 121.1(m)).  
28

1           5.58    The Rule further prohibits a certifying authority from requesting that a project  
2   applicant withdraw a certification request and resubmit it with additional information to extend  
3   the timeframe for review, even where the request lacks information necessary for the certifying  
4   authority to conduct a proper review. *Id.* at 42,285-286 (to be codified as 40 C.F.R. § 121.6(e)).  
5   This interpretation is in conflict with section 401's purpose of preserving state authority.

6           5.59    The Rule prescribes a broad range of circumstances under which a state's section  
7   401 review authority is deemed waived because of a state's purported failure to follow certain  
8   newly-included procedural requirements. *Id.* (to be codified as 40 C.F.R. § 121.9). Where a  
9   certifying authority fails to grant, grants with conditions, or denies a certification application  
10   within the reasonable time period, as determined by the federal agency, it waives its ability to do  
11   so. *Id.* (to be codified as 40 C.F.R. § 121.9(a)(2)). Additionally, where a certifying authority does  
12   not meet the Rule's procedural requirements in certifying or denying a section 401 application,  
13   the certification or denial will be deemed waived. *Id.* And where a condition imposed by a  
14   certifying authority is not supported by the required information, the condition is deemed waived.  
15   *Id.* In addition, where a certifying authority certifies an application without following the  
16   procedural requirements set forth in the Rule, the certification will be deemed waived. *Id.* (to be  
17   codified as 40 C.F.R. § 121.9(b)).

18           5.60    Taken together, these procedural requirements of the Rule impermissibly expand  
19   the waiver provision of section 401 in conflict with the Act's language and Congressional intent.

20           5.61    Further, these procedural requirements of the Rule significantly impair the ability  
21   of States and other certifying authorities to fully and efficiently review project proposals for water  
22   quality impacts and will likely result in an increase of certification denials for lack of sufficient  
23   information.

24           5.62    These unprecedented restrictions also conflict with existing state practices,  
25   procedures, and regulations on initiating section 401 certification review, many of which were  
26   developed in reliance on EPA's long-standing position on these requirements.

## HARMS TO PLAINTIFF STATES

6.1 The Rule harms the sovereign, environmental, economic, and proprietary interests of Plaintiff States.

6.2 The States' respective jurisdictions encompass a substantial portion of the United States. Along with countless other waterbodies and wetlands, the water resources found within Plaintiff States include the entirety of the Pacific Coast from Mexico to Canada, large portions of the Atlantic Coast, the Great Lakes and Lake Champlain, Chesapeake Bay and its tributaries, and the majority of the Columbia River. Plaintiff States contain headwaters formed in the Sierra Nevada, Cascades, Rocky, and Appalachia mountains. Many of the nation's largest rivers originate in and/or flow through the Plaintiff States, including the Mississippi, the Columbia, the Colorado, and the Hudson. The States have a fundamental obligation to protect these waters and wetlands, both for their own economic interests and on behalf of the millions of residents and thousands of wildlife species that rely on them for survival. Many States also legally hold both the surface and groundwaters within their borders in trust for their residents.

6.3 The Rule significantly impairs Plaintiff States' abilities to protect the quality of these waters. In the Act, Congress preserved the States' broad, existing powers to adopt the conditions and restrictions necessary to protect state waters, so long as those efforts were not less protective than federal standards. To those ends, the States have long exercised section 401 authority to protect against adverse impacts to water quality from federally licensed or permitted activities within state borders.

6.4 As described in detail above, the Rule unlawfully curtails both the scope of water quality-related impacts that the States can address, and the sources of state law on which States can base certification review and decisions for federally licensed or permitted projects. For example, the Rule narrowly defines the scope of 401 certification as "limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." 85 Fed. Reg. 42,250. The definition of "water quality requirements" in the Rule, in turn, further narrows the scope to only specified provisions of the Act and state and tribal

1 regulatory requirements “for point source discharges into waters of the United States.” 85 Fed.  
2 Reg. 42,285 (to be codified at 40 C.F.R. § 121.1(n)).

3         6.5     Consistent with longstanding relevant Supreme Court and lower court decisions,  
4 section 401 certification practice, and EPA guidance, when evaluating requests for section 401  
5 certification the States have used section 401 to review all potential water quality impacts from a  
6 proposed project, both upstream and downstream and over the life of the proposed project. The  
7 States also have reviewed impacts as they relate to both “waters of the United States” and state  
8 waters, including groundwater, as defined under their respective state laws. In doing so, the States  
9 have assessed project impacts pursuant to a broad range of appropriate water-related state law  
10 requirements, including requirements applicable to both point and non-point sources of water  
11 pollution.

12         6.6     For example, the States have used section 401 authority to address water quality  
13 impacts that, depending on the circumstances, may not be non-point: turbidity associated with  
14 dam reservoir wave action and pool level fluctuations, aquatic habitat loss, contamination of  
15 groundwater supplies, contaminant loading from spills and discharges associated with over-water  
16 industrial activities, impacts on stream flows, and wetland fill. States have also used section 401  
17 authority in the context of large water supply projects to require mitigation to address long-term  
18 impacts from operation, such as hydrologic modifications and water quality degradation  
19 associated with enhanced stratification in new and expanded reservoirs. Impacts such as  
20 stormwater runoff, whether or not related to any particular point source discharge contemplated  
21 by the Rule, may have significant detrimental effects on water quality in and around project sites.  
22 In the case of western water diversion projects, stormwater runoff may adversely impact different  
23 river basins. Section 401 certifications have been one of the primary mechanisms the States have  
24 used to mitigate these impacts when associated with federally licensed and permitted projects.  
25 The Rule’s limitation to point source impacts will prevent States from addressing and preventing  
26 these harms under their section 401 authority, to the detriment of the States’ proprietary interests  
27 in the quality of those waters, their related ecosystems, and the general health and well-being of  
28 their residents.

1           6.7     In addition to impacts to state waters themselves, the Rule also directly harms  
2 other state economic and proprietary interests.

3           6.8     For example, many States own or hold in trust the fish and other wildlife  
4 populations within their borders, and have certain statutory obligations to protect these resources.  
5 Because the Rule prevents the States from fully protecting the aquatic habitat and resources those  
6 species rely upon for survival, the Rule will result in direct harms to wildlife and wildlife  
7 populations.

8           6.9     Increased pollution, degradation and loss of waters, as well as other impacts to  
9 water quality as a result of the Rule also will impair the States' water recreation industries by  
10 making waters less desirable for fishing, boating, and swimming, and curtailing commercial and  
11 tax revenues associated with such activities.

12           6.10    The States have relied on the 1971 Regulations and EPA's longstanding practice  
13 and guidance interpreting section 401 broadly to authorize protection of water quality from  
14 federally licensed or permitted projects within their borders. Over the decades since the  
15 promulgation of the 1971 Regulations, the States have expended significant resources to develop  
16 and implement their own regulatory programs based on that broad interpretation of section 401.  
17 The Rule upends the States' section 401 programs and will force the States to significantly revise  
18 these programs to conform to the Rule's requirements.

19           6.11    The Rule will cause the States to incur direct financial harms. For example, the  
20 Rule will force States to hire additional personnel to process requests for section 401  
21 certifications on the truncated timelines and with the additional procedures established by the  
22 Rule. Washington alone allocated over \$600,000 to hire the additional staff it anticipates will be  
23 required in order to conduct section 401 certification reviews under the Rule. This expenditure is  
24 for the 2020 fiscal year alone, and is an expense that is expected to continue year-over-year well  
25 into the future. Connecticut anticipates needing to hire at least two additional professional staff,  
26 and Wisconsin estimates expending an additional \$170,000 annually for additional staff to  
27 comply with the Rule. While state budgets are nearly always constrained, the effective date of the  
28

1 Rule comes during that time when states are facing a projected \$555 billion shortfall over the next  
2 two fiscal years due to the impact of the COVID-19 pandemic.

3 6.12 Most, if not all, of the States will incur costs related to the expensive and time-  
4 consuming process of revising their laws and regulations in order to conform to the Rule.

5 6.13 New Jersey, New York, and California, among other states, have robust  
6 application review and public comment processes outlined in both state law and regulation that  
7 will need to be overhauled in light of the Rule and EPA's dramatic shift in section 401 policy.  
8 These changes to state laws and regulations require investment of the same regulatory resources  
9 required to review and process section 401 certifications, none of which were considered in  
10 EPA's economic review of the proposed rule and potential harms.

11 6.14 Finally, the States have relied on EPA's longstanding and consistent interpretation  
12 of section 401 as conferring broad authority on the States to protect water quality within their  
13 respective jurisdictions, whether those impacts occur from a specific discharge or by operation of  
14 a project as a whole, consistent with the statutory text and Supreme Court precedent.

15 6.15 By abandoning this long-standing position and policy, the Rule substantially  
16 degrades the primary mechanism by which States have ameliorated or avoided impacts to state  
17 waters from federally licensed and/or permitted activities, contrary to Congress's intent. As a  
18 result, the Rule forces the States either to incur the financial and administrative burdens  
19 associated with instituting or expanding their water protection programs or to bear the burdens of  
20 degraded waters.

21 6.16 Expanding water protection programs will require difficult and time-consuming  
22 processes involving state program creation and expansion, state legislative and regulatory  
23 changes, and state appropriation and expenditures. And, the Rule compromises the States' long  
24 reliance on section 401 to ensure the full scope of state water quality protections apply to  
25 activities that are otherwise preempted from state regulation.

26 6.17 Applicants for section 401 certification have also relied on EPA's longstanding  
27 position that section 401 allows an applicant to work with a state certifying authority to define a  
28 mutually acceptable scope and timeframe for agency review. By forcing state certifying agencies

1 to unnecessarily limit the scope and timeframe of their review, the Rule increases the chances that  
 2 section 401 requests will be needlessly denied, leading to administrative inefficiencies and  
 3 unnecessary litigation, and the loss or delayed benefits of projects that would have been certified  
 4 had the States been operating under the previous regime. In its haste to promote energy  
 5 infrastructure pursuant to President Trump’s Executive Order—a consideration that is not  
 6 entertained in any capacity by the text or purpose of the Act—EPA utterly failed to assess the  
 7 unintended impacts the Rule will have on the States and the regulated parties seeking certification  
 8 under section 401.

9 6.18 The relief sought herein will redress these and other injuries caused by the Rule.

## 10 CAUSES OF ACTION

### 11 FIRST CAUSE OF ACTION

#### 12 Arbitrary and Capricious and Not in Accordance with Law 13 Unlawful Implementation of Section 401 of the Clean Water Act 14 in Violation of the Administrative Procedure Act 15 (5 U.S.C. § 706)

14 7.1 Plaintiff States re-allege the facts set out in Paragraphs 1.1 through 6.18 as though  
 15 fully set out herein.

16 7.2 The APA provides that this Court “shall” “hold unlawful and set aside” agency  
 17 action that is “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with  
 18 law.” 5 U.S.C. § 706(2)(A).

19 7.3 Agency action is not in accordance with the law if the agency fails to interpret and  
 20 implement the statutory language consistent with the statute’s text, structure, and purpose and  
 21 with controlling Supreme Court precedent.

22 7.4 The Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7,  
 23 121.8, and 121.9, is an unlawful and impermissible implementation of section 401 of the Clean  
 24 Water Act, 33 U.S.C. § 1341, as interpreted by the United States Supreme Court, because it  
 25 unlawfully limits the States’ authority granted to them by Congress through enactment of the Act.

26 7.5 As a result, the Rule must be set aside as arbitrary, capricious, and not in  
 27 accordance with law.  
 28



**SECOND CAUSE OF ACTION**  
**Arbitrary and Capricious and Not in Accordance with Law**  
**Disregard of Prior Agency Policy and Practice**  
**in Violation of the Administrative Procedure Act**  
**(5 U.S.C. § 706)**

7.6 Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as though fully set out herein.

7.7 When an agency promulgates a rule that modifies its long-standing policy or practice, it must articulate a reasoned explanation and provide a rational basis for doing so.

7.8 An agency modifying or abandoning its long-standing policy or position must consider and take into account the reliance interests that are impacted by the change.

7.9 In adopting the Rule, Defendants failed to provide a reasoned explanation for defying the Supreme Court's long-standing interpretation of section 401 and abandoning their own long-standing policy and practice of interpreting section 401 as a broad reservation of states' rights.

7.10 The Rule lacks a rational basis because—despite EPA's assertions to the contrary—the Rule will increase uncertainty and decrease predictability in the section 401 certification process.

7.11 Defendants also failed to consider and take into account the serious reliance interests engendered by the Agency's prior long-standing policy and position regarding state authority under section 401.

7.12 For these reasons, the Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7, 121.8, and 121.9, is arbitrary, capricious, and not in accordance with law, and must be set aside.

**THIRD CAUSE OF ACTION**  
**Arbitrary and Capricious and Not in Accordance with Law**  
**Failure to Consider Statutory Objective and Impacts on Water Quality**  
**in Violation of the Administrative Procedure Act**  
**(5 U.S.C. § 706)**

7.13 Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as though fully set out herein.

1           7.14    Agency action is not in accordance with law if the agency fails to consider the  
2 applicable statutory requirements.

3           7.15    Agency action is arbitrary and capricious if the agency fails to consider important  
4 issues, considers issues that Congress did not intend for it to consider, or fails to articulate a  
5 reasoned explanation for the action.

6           7.16    When Defendants promulgated the Rule, they were required to consider whether it  
7 met the Act's objective of restoring and maintaining the chemical, physical, and biological  
8 integrity of the Nation's waters as set forth in 33 U.S.C. § 1251(a).

9           7.17    The protection of water quality is the paramount interest that must be considered  
10 by Defendants when promulgating regulations for the administration of the Clean Water Act,  
11 including those defining the contours of state authority to condition or deny section 401  
12 certification requests.

13           7.18    Defendants promulgated the Rule without weighing its adverse impacts to the  
14 Nation's waters. Directed by an Executive Order aimed at increasing domestic energy production  
15 without any consideration of water quality, Defendants relied on factors that Congress did not  
16 intend for it to consider. Defendants also failed to consider how those impacts undermine, rather  
17 than further, the Act's objective of restoring and maintaining the integrity of the Nation's waters.

18           7.19    The Rule, including but not limited to Sections 121.1, 121.3, 121.5, 121.6, 121.7,  
19 121.8, and 121.9, conflicts with the Clean Water Act's objective to protect water quality. As a  
20 result, the Rule is arbitrary and capricious and not in accordance with law.

21                                   **FOURTH CAUSE OF ACTION**  
22                                   **Agency Action in Excess of Jurisdiction**  
  **(5 U.S.C. § 706)**

23           7.20    Plaintiff States re-allege the facts set out in the Paragraphs 1.1 through 6.18 as  
24 though fully set out herein.

25           7.21    Under the APA, the Court "shall . . . set aside agency action" that is taken "in  
26 excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §  
27 706(2)(C).  
28

8           7.24     EPA also relies on section 304 of the Act, in which Congress directed EPA to,  
9     “promulgate guidelines establishing test procedures for the analysis of pollutants that shall  
10    include the factors which must be provided in any certification pursuant to section 401 of this Act  
11    or permit application pursuant to section 402 of this Act.” 33 U.S.C. § 1314(h). But nothing in  
12    section 304 authorizes EPA to promulgate regulations that infringe upon state authority or dictate  
13    state law or administrative procedures in reviewing requests for and granting or denying  
14    certifications pursuant to section 401.

17 **RELIEF REQUESTED**

19 1. Declaring that in developing and adopting the Rule, EPA acted arbitrarily and  
20 capriciously and not in accordance with law, abused its discretion, and exceeded  
21 its statutory jurisdiction and authority;

22 2. Declaring the Rule unlawful, setting it aside, and vacating it;

23 3. Awarding the Plaintiff States their reasonable fees, costs, expenses, and  
24 disbursements, including attorneys' fees, associated with this litigation under the  
25 Equal Access to Justice Act, 28 U.S.C. § 2412(d); and

4. Awarding the Plaintiff States such additional and further relief as the Court may deem just, proper, and necessary.

Respectfully submitted this 21st day of July, 2020,

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**SIGNATURE ATTESTATION**

Pursuant to Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the other signatories.

DATED: July 21, 2020

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